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In the Supreme Court of the United States

OCTOBER TERM, 1988

KRISTINE M. GEBBIE,
Assistant Director, Human Resources,
Administrator, Health Division of
the State of Oregon

Petitioner,

v.

WILLIAM J. BRADY, M.D.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When government discharges a high-level executive branch official, and a jury later concludes that government's public explanation for its action was wrong or ill-founded, does *any* resulting injury to the official's reputation automatically deprive the official of a constitutionally protected liberty interest?

2. Is a jury entitled to conclude that a discharged public official has been denied a constitutionally adequate opportunity to clear his name, when the official was offered an informal meeting with the decision-maker to discuss his proposed discharge, he submitted and the decision-maker considered his written response, and he had access to the media to publicize his response?

3. Is the law defining the scope of a public official's protected liberty interest and the procedure owed in a "name-clearing hearing" sufficiently certain to deprive government employers of qualified immunity for their good faith efforts to provide due process?

TABLE OF CONTENTS

Page

Questions Presented i

Petition for Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 1

I. Factual Summary 1

II. Procedural History 8

Reasons for Granting the Writ 10

I. The firing of an at-will public official, along with defamatory comment by government in explaining the firing, does not *per se* deprive a public official of a protected liberty interest 13

II. The Ninth Circuit erroneously frames the question of what process is due as a pure question of fact for resolution by the jury 22

III. Gebbie was entitled to qualified immunity because she acted in unquestioned good faith and the law concerning liberty interests and name-clearing hearings is far from settled 28

Conclusion 31

Appendix A App-1

Appendix B App-31

TABLE OF AUTHORITIES

Page

Cases Cited

Baden v. Koch, 799 F.2d 825 (2d Cir. 1986) ..... passim

Barr v. Matteo, 360 U.S. 564 (1959) 20-21

Benson v. Allphin, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) 30

Bishop v. Wood, 426 U.S. 341 (1976) 14

Board of Regents v. Roth, 408 U.S. 564 (1972) 14-15,26

Boston v. Webb, 783 F.2d 1163 (4th Cir. 1986) 26

Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988) ..... passim

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 15-16

Campbell v. Pierce County, Ga., 741 F.2d 1342, 1345 (11th Cir. 1984), *cert. denied*, (1985) 27

Codd v. Velger, 429 U.S. 624 (1977) 14,16,26

Davis v. Scherer, 468 U.S. 183 (1984) 30

Dickson v. Office of Personnel Management, 828 F.2d 32 (D.C. Cir. 1987) 27,30

Doe v. United States Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985) 27

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 20

In re Selcraig, 705 F.2d 789 (5th Cir. 1983) 27

Mathews v. Eldridge, 424 U.S. 319 (1976) 23,25,29

Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) 17

Nathanson v. United States, 630 F.2d 1260 (8th Cir. 1980) 16

New York Times v. Sullivan, 376 U.S. 254 (1964) 19-20

Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded* 438 U.S. 902 (1978) 16

Paul v. Davis, 424 U.S. 693 (1976) 13,14,15

TABLE OF AUTHORITIES—Continued

Page

Cases Cited—Continued

Perry v. F.B.I., 781 F.2d 1294 (7th Cir.), *cert. denied*, 479 U.S. 814 (1986) 27,30

Rodrigues de Quinonez v. Perez, 596 F.2d 486 (1st Cir.), *cert. denied*, 444 U.S. 840 (1979) 27

Rosewitz v. Latting, 689 F.2d 175 (10th Cir. 1982) 26-27

Spalding v. Vilas, 161 U.S. 483 (1896) 20

Stretten v. Wadsworth, 537 F.2d 361 (9th Cir. 1976) 16

Velger v. Cawley, 525 F.2d 334 (2d Cir. 1975) *rev'd on other grounds sub nom* 16

Ventetuolo v. Burke, 596 F.2d 476 (1st Cir. 1979) 17

White v. Thomas, 660 F.2d 680 (5th Cir. 1981) 27

Withrow v. Larkin, 421 U.S. 35 (1975) 27

Constitutional Provisions

U.S. Const., Amend. XIV 1

Statutory Provisions

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 8

PETITION FOR WRIT OF CERTIORARI

Petitioner Kristine Gebbie, the Administrator of the Oregon Health Division, respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Brady v. Gebbie*, Nos. 87-3839 and 87-3877 (October 31, 1988).

OPINION BELOW

The court of appeals opinion is reported as *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988). A copy of the opinion is attached as Appendix A. The district court did not issue an opinion.

JURISDICTION

The court of appeals' opinion was filed on October 31, 1988. Judgment was entered the same day, and this petition was filed within 90 days. Section 1254(1) of Title 28 confers jurisdiction on this Court to review cases in the court of appeals by writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Summary.

William J. Brady was the chief medical examiner for the State of Oregon and reported to the administrator of the State Health Division, Kristine Gebbie. On June 20, 1986, Brady told Gebbie that he had kept a private office account that was

funded by money he received from certain research organizations in exchange for pituitaries and skin samples he had removed from corpses. A reporter from *The Oregonian*, the state's major newspaper, had learned about the account. The reporter had asked Brady how he would feel if the press were to break a story suggesting not only that he had sold human parts obtained from state autopsies, but that he used those funds to maintain a separate office account to finance, among other things, Halloween parties in the morgue. Brady wanted to tell Gebbie about the account before the news broke.

The discovery of the account distressed Brady. He said that he had known that the account "would present a problem" and offered to resign. Gebbie declined his offer, saying that she would have to hear something more substantial before she could make a decision. Gebbie then called the Oregon Attorney General's office for advice and learned that Brady was the subject of a criminal investigation stemming from the office account.

The next day, Brady again met with Gebbie and gave her a letter admitting that the account "has brought discredit to a fine office." He again tendered his resignation. In light of the information she had received about the criminal investigation, as well as Brady's admission to her, Gebbie notified Brady in writing that she was suspending him until the Attorney General's office completed the criminal investigation. She then issued a public statement to that effect.[1]

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[1] That public statement read, in part:

> Dr. William J. Brady, State Medical Examiner, has been suspended without pay pending a Department of Justice investigation into allegations that miscellaneous fees coming to the Medical Examiner's office were put into a special account, apparently for the purchase of office amenities.
>
> Dr. Brady reported on Thursday, June 20th to Miss Gebbie, Administrator of the Health Division, this miscellaneous fund was set up to help with "office extras" and the fund has been in exis-

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Brady's case immediately became front page news. Brady was a prominent public figure in Oregon, and the details of the account created a minor sensation around the state.[2] While Gebbie declined to issue any public comments during the three-month criminal investigation, Brady, for his part, did not remain idle. He met with the press and newspaper editors. He also engaged an attorney to represent him in the ongoing criminal investigation.

Brady conceded at trial that he had referred to the office account, which he and his attorney knew to be a major issue, as a "slush fund," that the account was unauthorized and "off the budget," that he knew he would be criticized for it, and that the money in the account was public money. The account was used to pay for parties and employee lunches as well as for office equipment. From June 22 until mid-September, when the criminal investigation ended, Brady's attorney reviewed Brady's records, talked with state investigators about the course of the investigation and interviewed potential witnesses. The investigation itself involved interviews with scores of witnesses, including Brady.

In September 1985, the Attorney General completed the criminal investigation and issued his report. Brady and Geb-

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tence over a number of years.

> "I have asked the Department of Justice to handle this investigation," said Gebbie, "to provide an impartial, in-depth investigation of the matter and report back to me with all of the findings." (Pl. Ex. 89).

[2] Brady's colleagues told the media, for example, that Brady had supplied them with skin samples from male and female genitalia. Problems within the medical examiner's office also surfaced; Brady's co-workers told the press that they "feared" Brady would be allowed to return after his suspension. Brady's friends spoke with the press and described him as a Dr. Jekeyl and Mr. Hyde. Brady himself talked with the media and explained that he had received late night calls threatening him because he had fired a popular doctor in the medical examiner's office.

bie each received a copy. The Attorney General concluded that criminal prosecution was not appropriate, but recommended that civil sanctions be pursued and that the matter be referred to the state ethics commission. After reviewing the Attorney General's recommendation, Gebbie asked Brady to meet with her in her office on September 25, 1985.

Brady attended the meeting, accompanied by his attorney and one of his friends. Gebbie asked Brady for his resignation, but he withdrew the offer to resign. Gebbie then told Brady that she proposed to discharge him and gave Brady a letter setting out three charges based on the information in the report. These charges included: 1) using the proceeds he received as reimbursement for specimens and autopsy report transcriptions to establish and maintain a slush fund for office parties and amenities; 2) using state and county facilities to conduct private autopsies for personal gain, in violation of state conflict of interest policies; and 3) causing the state to be billed for toxicological reports made in connection with Brady's privately conducted autopsies. The letter stated:

> In light of the seriousness of these charges and the proposed actions, you may have an opportunity to respond and present information in rebuttal o[r] mitigation before a final decision is made. If you wish it, a meeting for that purpose will be held on October 2, at 2:30 p.m. You may be represented by counsel at that meeting if you so choose.

At the September 25 meeting, Gebbie told Brady that she would listen to what he had to say, but added "I don't know what in heaven's name you can tell me, Bill, that would make me change my mind." Gebbie issued a press release that day announcing the proposed termination.[3]

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[3] The press release stated that the "reasons for this action include creation of a private fund using money which should have been deposited to the general fund, receipt of payment for autopsies which were a required part of his duties and use of public resources (facility, secretarial support and laboratory services) for private autopsies. These judgmnt [sic] errors are a serious breach of the duties of an administrator in state service."

Before the October 2 meeting, Brady's attorney asked a Health Division employee for a postponement. The employee responded that Gebbie was holding the hearing as a courtesy to Brady and indicated that Brady would not be allowed to "summon or subpoena" witnesses to the meeting. On October 2, Brady came to Gebbie's office, again accompanied by his attorney. He refused to participate in what he described as a "sham" hearing and asked for more time. But when Gebbie asked what other information would be available if she granted his request for a continuance, neither Brady nor his attorney identified any information. She accordingly denied his request to postpone the hearing.

After Brady refused to present any defense or response to the charges, Gebbie issued a press release on October 3. It stated that Gebbie had discharged Brady and explained the reasons for her action.[4] The next day, Brady's attorney deliv-

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[4] A copy of the October 3, 1985 press release consisted of two pages. Due to its length, it is attached as Appendix B. In part, the release stated:

> The integrity and ethics of a position of public trust are the central standard of Oregon's system of government. Dr. Brady knowingly violated public trust and confidence and this cannot be outweighed by his technical skills.
>
> . . . .
>
> The Attorney General conducted a comprehensive three month investigation of allegations against Dr. Brady and his conduct in the State Medical Examiner's office. The findings of this investigation revealed four major areas of violations that have led to his termination:
>
> 1) Dr. Brady established a private autopsy business that he conducted from the State's Medical Examiner's office. He performed, and instructed his staff to perform, autopsies as well as process the necessary clerical work during the normal work hours they were employed by the State of Oregon. Payments from this business went into Dr. Brady's personal and private bank accounts. This money was not used for any office functions or supplies.
>
> 2) Dr. Brady performed private autopsies for federal agencies which were billed to the federal government. These autopsies should have been done in the normal process of state

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ered a seven-page letter to Gebbie explaining Brady's defense in detail. In the letter, Brady conceded that he had maintained a separate office account "funded by contributions and gifts from various research organizations and by charges for transcription of autopsy reports," which was used "for office amenities and social functions." He also conceded that this account was not established "within the agency's official budget and accounting reports." He argued, however, that because he had used this money to purchase items which could have been donated directly by contributors without violating state conflict of interest policies, there had been "no violation of the policy or at best a technical violation."

Addressing the charge that he used state facilities and equipment to conduct private autopsies, Brady argued that "[w]ith reasonable and understandable exceptions, he did not use *State* facilities, personnel or time to accomplish such autopsies." He further explained in his letter why he believed his limited use of state facilities to perform private autopsies

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business and at state expense. Monies from these autopsies went into Dr. Brady's private bank accounts.

3) Dr. Brady diverted over $16,000 of monies paid to the State of Oregon and placed these funds in a private bank account from which he authorized expenditures for such things as lunches, staff parties, coffee and other items not authorized by state government regulations.

4) Dr. Brady used state contracted laboratory services for his private autopsy business and charged the State of Oregon for these services.

. . . .

"State employees, particularly those in highly paid or visible positions, assume an extra burden of ethical behavior for managing the public's programs and money. State government cannot tolerate a dual system that excuses unethical behavior because of an individual's high position in government. State officials must exhibit a higher standard of integrity," said Gebbie. "I personally do not want to see state government's integrity violated in any way," Gebbie added.

was not in violation of the State's conflict of interest policy. He acknowledged, however, that while the policy authorizes employees to work for pay outside their regular employment, the policy forbids working "for private gain . . . while using State equipment." Brady argued that his use of state equipment was "minor," and that

> Far from reflecting negatively on the State or Department or an "unethical practice," [his] extracurricular autopsy services on *private* time brought great credit to the State and Department which has employed him for the past 16 years.

Finally, Brady addressed the charge that he had "in violation of this same policy, . . . caused the State to be billed for and to pay for toxicology reports performed for private autopsies for which [he] received personal compensation." He did not dispute that indeed the state had been billed for private toxicology reports; he asserted only that the mistake was not his. He argued that the error lay with the hospital which had "mistakenly billed the State Medical Examiner's office, rather than the . . . private party," and that "even the Attorney General's investigation Report concludes that these may have been *billing errors*" by the hospital.

In concluding his letter, Brady requested that Gebbie "consider the above response to the charges" and "rescind [her] decision to terminate [him] from the Executive Service." Alternatively, Brady requested appointment to a position in the classified service for which he was qualified. He also requested that he be compensated for his salary and benefits during the period of his suspension.

Gebbie considered the letter and reaffirmed her decision. Brady held press conferences throughout his final week as chief medical examiner and his views were widely reported. He told the press that he "knew all along that the account would get him in trouble." As he explained, when one

is dealing with the state medical examiner's funds, "You're not talking about private money, but public tax dollars."

II. Procedural History.

Brady filed suit against Gebbie under 42 U.S.C. § 1983. He alleged that Gebbie had deprived him of both a liberty and a property interest without due process by discharging him from public employment. Brady sought damages and reinstatement.

Brady contended in the pre-trial order that he had an implied contract right of employment amounting to a property interest and that Gebbie had deprived him of that property without due process by discharging him without a hearing. Similarly, he asserted that he was deprived of liberty without due process because the charges against him had falsely stigmatized him as dishonest and because he was denied a hearing. He asserted general damages of $2,500,000.

At trial, Brady produced eleven witnesses who testified about his reputation as a forensic pathologist and expert witness. None of these witnesses testified that Brady continues to enjoy less than an excellent professional reputation, and nine affirmatively testified that his reputation is excellent. Five witnesses stated that in their opinion, Brady's discharge had tarnished his reputation in the community. But only two witnesses referred specifically to Gebbie's statements, as opposed to the general publicity surrounding Brady's activities, as having affected Brady's reputation. None testified specifically about Brady's reputation for honesty or about the impact of his termination on that reputation.

One of Brady's witnesses, Dr. Reay, who is Chief Medical Examiner for King County, Washington, testified that Brady "is highly regarded as an expert in the field," and that he would "certainly recommend Dr. Brady for any job openings for forensic pathologists that might arise." Dr. Harris opined

that Brady's reputation had been damaged by the charges made against him. However, Dr. Harris also testified that Brady had retained him after Brady's termination to assist with Brady's private pathology practice in part because Brady had become very busy. Of the witnesses Brady called, none testified they would not employ him or would refuse to use his services because of the termination or because of Gebbie's publicized reasons for the termination. Indeed, three witnesses had used Brady's services since the termination, and two others said that they would do so in the future if the need arose. Finally, Brady testified that during his first year in private practice after being terminated from his public position service, he grossed $92,000 in professional service fees.

At the end of trial, Gebbie moved for a directed verdict on both the property interest and liberty interest claims.[5] The district court found that Brady had no protected property interest but it submitted the liberty interest claim to the jury. The jury found in Brady's favor and awarded him $300,000 in damages.

Gebbie appealed the denial of her motion for a directed verdict on the liberty interest claim. Brady cross-appealed the grant of Gebbie's motion on the property interest claim. Gebbie argued that the uncontroverted facts failed to demonstrate that she had deprived Brady of a liberty interest; that even if a liberty interest were implicated, she had provided Brady all the process to which he was entitled; and that in any event she was protected by qualified immunity.

The court of appeals affirmed the district court both on appeal and on cross-appeal. It held that Brady did not have a property interest because he had no statutory or implied contract right to continued employment. The court of appeals

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[5] Prior to trial, the district court granted Gebbie's motion for summary judgment on Brady's reinstatement claim.

further held that Brady did have a liberty interest, that a reasonable juror could conclude that the October 2 hearing was not "meaningful," and that a reasonable juror also could conclude that Gebbie was not entitled to qualified immunity.

REASONS FOR GRANTING THE WRIT

Few provisions of the Constitution have less certain contours than the Due Process Clause. Few interests protected by the Due Process Clause are less tangible than the notion of a liberty interest in reputation. Probably no procedure is less defined in substance than what is termed a "name-clearing hearing." In the context of discharging or disciplining at-will public employees, the only safe course for government is to take whatever personnel action is in the public interest, and then to say nothing and explain nothing about why the action was taken. Only in that way can government know with certainty that it has not crossed constitutional boundaries. But it is impossible for government to cloak itself in such secrecy, and it would be irresponsible for it to try. Public accountability demands explanation, and responsible government requires disclosure.

This case graphically illustrates government's very real dilemma when it believes it must take action in the face of apparent official wrongdoing and explain that action to the public. Here, Oregon's Chief Medical Examiner, an appointed upper-level government official, became the subject of a government investigation of wrongdoing which the media threatened to sensationalize. He immediately offered to resign. His superior, an executive branch agency head, was unwilling to act precipitiously or on the basis of incomplete information. Instead, she sought legal advice and waited for the completion of a criminal investigation into the allegations of wrongdoing. She steadfastly refused to comment on the matter in the months that followed, despite intensive media pressure for

answers and decisions. When the investigation was complete, she concluded that her subordinate had mishandled public funds and property, had fallen below the state's high standards of ethical behavior and no longer could command public trust and confidence. In private, she advised him preliminarily of her conclusions; she later met with him to hear any response he had to offer; and even after she made her decision she considered his written response to the charges. She then explained her actions to the public and the media which, from the beginning, had followed the case closely and intensively. The Chief Medical Examiner sued. A year and a half later a federal jury determined that the administrator's judgment was wrong. Although she had an absolute right to fire the Chief Medical Examiner, the jury concluded that the explanation of the firing unconstitutionally deprived him of liberty without due process of law and awarded him substantial damages.

As the Ninth Circuit analyzes this case, there is little government responsibly can do to limit its exposure when embroiled in controversy surrounding its at-will, public officials. If government removes the official from office and publicly comments on the removal, government is subject to potential liability on two fronts. First, government can be liable if its conduct merely impairs the public official's reputation and it has not afforded the official a hearing to refute the public statements. Second, even if government offers a hearing, it subjects itself to potential liability because a jury later may conclude that more or different process was appropriate. Thus, when government takes the responsible course of dealing with top-level, at-will public officials, the Ninth Circuit's analysis subjects it to being second-guessed and penalized heavily.

If government declines to act at all, it avoids potential liability. However, the discretion invested in the executive

branch to remove at-will officials is effectively nullified. If government acts, but declines to comment publicly, it again probably avoids liability, but the public is uninformed on matters of unquestionable public interest and importance. Neither of these options is acceptable, yet they remain virtually the only options by which government can be reasonably assured it is not exposing itself and the public treasury to unlimited potential liability.

The Ninth Circuit's analysis turns on three legal holdings, each of which is an unwarranted extension of constitutional principles. First, the court of appeals concludes that a constitutionally protected liberty interest is at stake because Brady was fired and his professional reputation was damaged by statements the jury could have found to be false. The court so concludes even though Brady has no constitutionally protected interest in retaining his at-will employment, whether government's reasons for the firing were well-founded or false, and even though government damage to reputation alone is not itself of constitutional dimension. Thus, under the Ninth Circuit's analysis, the whole is greater than the sum of its parts: a firing of non-constitutional dimension coupled with a reputation injury of non-constitutional dimension rises to the level of a due process wrong.

The Ninth Circuit then considered what process was due Brady. It decided that the process must be "meaningful," and that whatever the jury thinks is meaningful is the process that was due. Thus, if the jury believed "meaningful" process required a full adversarial hearing, it could find that the government did not give Brady due process. Likewise, if the jury believed Gebbie should have delayed the hearing further or should have been more open-minded about letting Brady keep his job, it could find that his "name-clearing hearing" fell below constitutional requirements.

As a final blow, the Ninth Circuit rejected Gebbie's qualified immunity defense. It concluded, quite simply, that the law is clear that there is a liberty interest in reputation, and that the law is equally clear that stigmatization requires a meaningful "name-clearing hearing." Even assuming that the circumstances that give rise to a protected liberty interest are as plain as the decision below suggests, the court's resolution of what process is due defies any suggestion that officials can know in advance what procedures to follow. The Ninth Circuit's holdings, singly and together, force government to stand mute or to risk having a jury freely second guess its employment decisions. The consequences of the Ninth Circuit's decision are extreme and significant; the Ninth Circuit's reasoning is faulty; and the decision below conflicts with those of other lower courts and this Court.

I. The firing of an at-will public official, along with defamatory comment by government in explaining the firing, does not *per se* deprive a public official of a protected liberty interest.

At trial, Gebbie moved for a directed verdict, as well as for judgment notwithstanding the verdict, on the basis that Brady's evidence did not demonstrate he had been deprived of a protected liberty interest. The Ninth Circuit ruled that the trial court correctly denied the motions. In its decision, the Ninth Circuit held that Brady was an at-will public official who had no protected property interest in his job. 859 F.2d at 1547-51. The Ninth Circuit also recognized that reputation alone is not a protected liberty interest. 859 F.2d at 1553 (citing *Paul v. Davis*, 424 U.S. 693 (1976)). The court concluded, however, that firing an at-will official, when combined with injury to reputation, automatically rises to the level of a liberty interest protected by the Due Process Clause. 859 F.2d 1552-53.

The Ninth Circuit considered the question settled both by this Court and by its own opinions. This Court's opinions, however, do not all point in the same direction. Unequivocally, this Court has held that government is free to discharge an at-will employee without any hearing at all, because at-will employment is not an interest which the Due Process Clause protects. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972). Unequivocally, this Court has held that government's act of defaming an individual does not result in a deprivation of liberty, unless there is some injury to a state-secured right or privilege. *Paul v. Davis*, 424 U.S. 693, 712 (1976). However, this Court has never determined that a discharge of non-constitutional dimension, coupled with defamation of non-constitutional dimension, automatically amounts to a constitutional deprivation of liberty.

This Court did not reach the question in the one case where it was squarely presented. *See Codd v. Velger*, 429 U.S. 624 (1977) (per curiam).[6] While it is true that other decisions

[6] In *Codd v. Velger*, 429 U.S. 624 (1977), a policeman alleged he was dismissed from his position because of stigmatizing information in his file which, he claimed, also interfered with his ability to obtain other employment in his profession. The trial court concluded that because the police officer was not foreclosed from other employment opportunities, he had not been unconstitutionally stigmatized. *Id.* at 625. The intermediate appellate court found a constitutional violation because the information was of a kind to impair future employment opportunities. *Id.* at 626. This Court declined to address whether the nature of the information and the circumstances of its dissemination implicated a liberty interest. *Ibid.* Because the employee had never asserted that the stigmatizing information was false, his liberty interest claim failed on that ground. 429 U.S. at 628.

The question may also have been presented in *Bishop v. Wood*, 426 U.S. 341 (1976). There this Court declined to hold that a police officer had been deprived of a liberty interest when discharged from his at-will employment. The Court found the lack of publication of the reasons for the discharge to be fatal to the employee's claim: It would "stretch the concept [of liberty] too far 'to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another." [*Board of Regents v. Roth*, 408 U.S.] at 575." 426 U.S. at 348. The Court left unanswered the critical inquiry of the extent to which a public statement of reasons would restrict the employee's freedom to secure future employment, and whether that restriction would amount to a loss of liberty protected by the Due Process Clause.

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of this Court suggest that reputational injury and discharge together may be enough in some cases, none of the Court's decisions has ever advanced the *per se* rule that the Ninth Circuit adopted here. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court commented that had university officials, in the course of declining to rehire a professor, made statements "that might seriously damage his reputation and associations in the community . . . this would be a different case." In nearly the next breath, however, the Court noted that the stigma might have to do more than just damage reputation, it might have to "foreclos[e] his freedom to take advantage of other employment opportunities . . . or bar the respondent from all other public employment in state universities." *Ibid.*

In *Paul v. Davis*, the Court also suggested, by negative implication, that reputational injury plus discharge might suffice in some cases, but it neither held nor suggested that it would suffice in all. And in contrast to the mixed observations of the preceding cases, the decision in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), suggests, without expressly holding, that reputation damage plus loss of at-will employment will not suffice.[7] In short, the Court has never addressed

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348. The Court left unanswered the critical inquiry of the extent to which a public statement of reasons would restrict the employee's freedom to secure future employment, and whether that restriction would amount to a loss of liberty protected by the Due Process Clause.

[7] In *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the federal government revoked a short order cook's security clearance, causing her to lose her job. As the dissent observed, by revoking the security clearance, government had deeply marred the employee's reputation with the "sinister" label of "security risk." Because of that branding, other public and future prospective employers might well infer she was a communist or disloyal to the government. 367 U.S. at 901 (Brennen, J. dissenting). The majority, however, was not persuaded that the injury to reputation, even coupled with the discharge, was severe enough to be of constitutional dimension:

Finally, it is to be noted that this is not a case where govern-

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the issue squarely. Drawing guidance from the Court's decisions, the most that can be said is that the Court's opinions do not define the contours of the right.

The courts of appeals are not uniform in their treatment of the liberty interest question, even within their own circuits. In *Velger v. Cawley*, 525 F.2d 334, 336 (2d Cir. 1975) *rev'd on other grounds sub nom Codd v. Velger*, 429 U.S. 624 (1977), the Second Circuit held that for a reputation interest to be protected by the Due Process Clause, the stigma must operate to foreclose other employment opportunities. Later, however, in *Baden v. Koch*, 799 F.2d at 825, 830-31 (2d Cir. 1986), the Second Circuit concluded that a public official had suffered a "relatively weak" liberty interest when merely demoted (rather than discharged) in connection with widely publicized, derogatory comments. Similarly, in *Owen v. City of Independence*, 560 F.2d 925, 936 (8th Cir. 1977), *vacated and remanded*, 438 U.S. 902 (1978), the Eighth Circuit declared the test for a liberty interest to be whether the charge might seriously damage the employee's standing and reputation in the community. It later concluded, however, that a liberty interest is implicated by a stigma which impairs future employment opportunity. *Nathanson v. United States*, 630 F.2d 1260, 1264 (8th Cir. 1980).

Like other courts, the Ninth Circuit has not been consistent in its analysis of liberty interest claims. In the present case, it concludes that any damage to reputation combined with any discharge from at-will employment *per se* gives rise to a protected liberty interest. *Brady v. Gebbie*, 859 F.2d at 1553. However, in *Stretten v. Wadsworth*, 537 F.2d 361, 366 (9th Cir. 1976), the court held that a liberty interest was not implicated where charges merely resulted in reduced economic

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ment action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity.

367 U.S. at 898.

returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment.

Finally, some circuits find a protected liberty interest is implicated when defamation causes either reputational or economic harm; however, the harm must be extreme. *See, e.g.*, *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985) (liberty interest implicated when either 1) individual's good name, reputation, honor or integrity are at stake by such charges as immorality, dishonesty, alcoholism, disloyalty, Communism or subversive acts, or 2) the state imposes a stigma or other disability on the individual which forecloses other employment opportunities); and *Ventetuolo v. Burke*, 596 F.2d 476, 483 (1st Cir. 1979) (charges of insubordination and hostility towards the employer are not a stigma which foreclosed job opportunities nor did they seriously damage standing and associations in the community).

Both lower courts and public employers need this Court's further guidance. As the decisions cited above suggest, few courts adopt the *per se* rule that the Ninth Circuit adopted: any discharge coupled with any defamatory remark comes within the Due Process Clause's protection. Most jurisdictions require some significant injury to the discharged employee's future employment opportunities or a virtual foreclosure of those opportunities. Others find a liberty interest triggered only if the damaging remarks are so stigmatizing as to genuinely impair associational interests. These formulations, by entailing more than just discharge and some reputation loss, serve to ensure that the employee's interests are harmed in a way greater than and different from the fact of the discharge itself. The Ninth Circuit's analysis, however, fails to focus on any kind of harm to the employee's interests beyond that which inheres in the discharge itself.

Some damage to reputation follows virtually any time an at-will employee involuntary is removed from his or her posi-

tion, for a certain amount of social disapprobation attaches to the fact that an employee has been "fired." In the case of high-ranking and highly visible public officials who serve at the pleasure of the executive branch of government, the predictable damage is both more inevitable and more severe. Government officials in positions of high rank commonly enjoy a particularly good reputation in the community because they occupy offices of particular public visibility and trust. They are well known and enjoy high prestige because of their official title and authority. Any fall from grace within government can be expected to bring about a fall from grace in the public's perception of that official. Any firing, explained or not, certainly will cause a public official's reputation to suffer. Some damage to reputation, some loss of earning capacity, and some difficulty in obtaining future public employment goes with the territory when an official with considerable public recognition unwillingly is removed from office.

Without question, Brady alleged and demonstrated at least some loss of public stature, due at least arguably to Gebbie's comments as well as to the swirl of published media speculation and press investigation into Brady's activities. Several of his witnesses believed that his professional reputation had been tarnished. Two witnesses expressed reluctance to use him as an expert witness in trials due to concern that his credibility might be impeached by the controversy surrounding his removal from office. Finally, he earned only $92,000 in his first year in private practice, which was less than his previous total annual income as chief medical examiner as supplemented by his private earnings. Yet none of Brady's witnesses personally thought less of him, none thought his professional reputation was less than excellent, and none testified his reputation for honesty or his general reputation had been damaged. Every witness who was asked

said, without reservation or question, they would readily use Brady's services as a private pathologist; some of the witnesses in fact had done so. And Brady's private practice was doing well enough that he had associated another pathologist to help him with the demand for his services.[8]

The nature of Brady's reputation loss and the circumstances which caused it should not be elevated to constitutional significance. True, a jury could conclude from this evidence that Brady's reputation was at least in some way damaged. It could even conclude that the injury was attributable in some sense to Gebbie's comments. However, society's special interest in a free dialogue about the performance of its public officials and the exposure of high public office must bear on whether Brady's reputation damage implicated a liberty interest.

Thus, in analogous contexts, this Court has recognized that certain constitutional values require a public official's interest in reputation to give way to comment, speech and debate in a way that is not true for a private citizen. Free speech and free press rights, for example, are greater with respect to defamatory comments about officials, due to our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). When private citizens or the press defame a public official, they are not liable unless they published the defamation with actual malice. *Id.* at 279-80. The fact that the statement is false is not enough, for "erroneous statement is

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[8] The Ninth Circuit discussed this evidence only in rejecting our claim that the district court should have granted the motion for remittitur, reducing the damage award of $300,000. 859 F.2d at 1557-58. The Ninth Circuit ignored our argument that the circumstances of government's comments, the nature of the injury to reputation and Brady's ability to pursue his chosen profession was such that Gebbie's explanation of her actions did not implicate a constitutionally protected interest.

inevitable in free debate" on issues of public importance. *Id.* at 271-72. The distinction between the protection given to visible public officials and to private persons is justified by two considerations. First, private individuals are more vulnerable to injury because they lack access to the media to rebut charges; second, they are more deserving of recovery because they do not voluntarily choose to step into positions that inherently expose them to public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

This Court has been equally careful to guard against chilling government's ability to comment on the performance of its officials and employees. To ensure "the fearless, vigorous, and effective administration of policies of government," the Court has accorded public employers absolute immunity from tort liability for defaming public employes, so long as the defamation occurs in the scope of the employer's official duties. *Barr v. Matteo*, 360 U.S. 564, 571 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896). Thus, in *Barr v. Matteo*, after several government employees had come under widely publicized scrutiny for possible mishandling of government funds, a federal agency head suspended the employees and issued a press release explaining his action. This Court held that so long as the government defendant acted within his authority, he was absolutely immune from liabilty even if he acted with malice. The decision recognized that effective administration of government demands that executive officials be free to act in the public interest, even when their action later turns out to be founded on mistake. *Id.* at 571, 574-75. Justice Black, concurring, stated the rationale even more forcefully:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of

> course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

Id. at 577.

Any delineation of the scope of a public official's protected liberty interest in reputation must account for these same policies.[9] The Ninth Circuit's wooden formulation that discharge plus reputation damage necessarily equals a protected liberty interest simply will not do. The answer may be that a public official must suffer stigmatization to the point that he or she effectively is cut off from all future gainful employment. Or the answer may be that the reputation loss must harm the employee's interest in freely associating with members of the employee's community. Finally, in the case of executive-level officials, perhaps government's defamatory comments must be made with actual malice, similar to what the public official would have to show in suing the press or a private citizen for libel. Whatever the answer, the injury must be greater, both in degree and kind, than that which inheres in the firing of an at-will, public official or in the notoriety that normally attends to any claim of misjudgment, mistake, wrongdoing or incompetence in public office. Any other conclusion undermines executive branch preogatives in discharging discretionary officials and merely punishes government for explaining its actions to the public.

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[9] Gebbie cited *Barr v. Matteo* to the Ninth Circuit by supplemental memorandum, along with Oregon decisions recognizing the same principle for absolute executive immunity from defamation suits brought by public officials. The Ninth Circuit mistakenly understood this to be an attempt to raise an absolute privilege defense for the first time on appeal and refused to address the argument. 859 F.2d at 1557. The point of the supplemental memorandum, however, was the same point we make here: that the Due Process Clause analysis should accommodate the same considerations as are accommodated by absolute immunity in a civil tort case.

II. The Ninth Circuit erroneously frames the question of what process is due as a pure question of fact for resolution by the jury.

If public officials have a protected liberty interest under circumstances such as those in this case, the question then is what process is due. That question, too, requires consideration of the government's interest in explaining its actions to the public and a public official's position of visibility. As the Ninth Circuit analyzes the issue, there is no legal threshold for invoking the Due Process Clause. The procedures government owes to a public official for a liberty deprivation are whatever a jury, long after the fact and through hindsight, believes should have been followed. Although there is significant uncertainty among lower courts as to the precise contours of a name-clearing hearing for an at-will employee, the Ninth Circuit's "let the jury decide" approach is sharply at odds with the way other courts have approached the same problem. It is also wholly at odds with the logic of constitutional analysis.

The Second Circuit's opinion in *Baden v. Koch*, 799 F.2d 825 (2d Cir. 1986), best highlights the defects in the Ninth Circuit's decision. *Baden* is not only on point, it is strikingly similar in its facts. Dr. Baden was the chief medical examiner for the City of New York. Mayor Koch removed him from his at-will position after investigating his performance in office and concluding that it was sub-par. Mayor Koch permitted Baden to submit a written response to his proposed discharge. After deciding to discharge Baden, the mayor released to the press his decision and the reasons for it, together with Baden's written response. Baden sued on the theory that he had a protected liberty interest in his reputation, he had been defamed, and the city's hearing procedures fell below constitutional requirements. The jury awarded Baden $100,000 in

damages. On appeal, the Second Circuit reversed, concluding Baden received all the process he was due as a matter of law.

The Second Circuit began its discussion by acknowledging the problematic nature of Baden's claim to a protected liberty interest. 799 F.2d at 829. The court concluded, however, that Baden "asserted at best a weak liberty interest under the Fourteenth Amendment" (*Id.* at 831) and it therefore went on to consider what process was due.

Following *Mathews v. Eldridge*, 424 U.S. 319, 355 (1976), the court weighed Baden's liberty interest against the government's interest in taking action without the procedures Baden requested, and then considered the risk of an erroneous deprivation. As against Baden's weak liberty interest, the Second Circuit found that the government had a compelling interest in responding publicly and swiftly to complaints about executive officials.[10] In assessing the value of the added procedures Baden sought, the court observed that Baden was able to respond in writing to most of the charges, his response was turned over to the media, and he was able (although he declined) to make public responses to the media on other charges. 799 F.2d at 832 and n. 2. Although Baden wanted a formal, public trial-type hearing, the court concluded that

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[10] Specifically, the Second Circuit focused on government's particular interest in responding to complaints about public officials who serve at the pleasure of the executive branch:

> New York City's interest is in the ability of its executive officer to respond promptly and effectively to complaints about a high level official who is serving at the executive's discretion. Preserving that ability is plainly important to the functioning of government. The creation of such discretionary posts by the legislature is a recognition that quick adjustments among top personnel may sometimes be necessary for the executive branch to continue to do its job. Indeed, in giving the executive the power to make such personnel changes, the legislature also imposes a duty to do so. An executive who fails to act when the facts demand action will often be taken to task by the legislature, the media and the public for the continued shortcomings of his subordinates.

799 F.2d at 831.

such a hearing would have harmed Baden's reputation interests by bringing even greater publicity to the charges without adding significantly to Baden's opportunity to respond in writing. *Id.* at 832. Finally, the court observed that Baden was a "public figure" with a "high degree of access to the news media . . . as a forum in which to repeat his side of the story"; he presumably was able to call a press conference and provide further defense of his record or explanation of the events at any time. *Ibid.*

Weighing these considerations against the risk that false charges would go unrefuted or a falsely accused employee's name would go uncleared, the Second Circuit held, as a matter of law, no more process was due. Further process would not have materially aided either in the decision Mayor Koch had to make or in providing Baden with an opportunity to clear his name. Additional procedures, however, would have seriously undermined government's interest in making that decision and explaining it to the public.

> If we were to hold that a government executive's public statement of reasons for a discretionary personnel decision automatically triggered a requirement for a formal trial type hearing, executives would be tempted to refrain from explaining the personnel actions in public, a result contrary to the strong policy of maintaining an informed electorate. As a nation, we have a tradition of wanting our elected officials to explain why they do what they do. Furthermore, faced with the prospect of expensive, time-consuming trial-type hearings whenever an explanation is given for a discretionary employee's removal from office, municipal executives might well hestitate to make personnel decisions except in the most egregious cases. Attempts to fine-tune municipal administration would be abandoned as not worth the trouble. Executives would make do with subordinates whose performance is inept rather than face the high cost of transferring or replacing them. The legislature's deliberate decision that

> certain high level employees should serve at the executive's discretion would be rendered meaningless.

Id. at 833.

The Ninth Circuit's approach stands in stark contrast.[11] The lower court cast the question as one of the "meaningfulness" of the hearing in which every procedural complaint can support a conclusion that the hearing was a "sham." Under that theory, the question of what process is due necessarily is for the jury in all cases. A discharged official may argue to the jury, as Brady did, that a meeting in the administrator's office was too informal; that a week's notice of the date of the hearing was too short; that only a public and trial-type hearing would ferret out the truth; that he should have been able to summon and subpoena witnesses; and that the administrator should not have been so decisive. Or a dis-discharged official may assert that the administrator should not have expressed wonderment at what defense the employee might offer, even though months of investigation, on-going media interviews with the employee, and the employee's own discussions with the administrator suggested he had said everything he might possibly have to say for himself. Countless questions of the procedural requirements of the Due Process Clause are thus converted into case-by-case, factual inquiries, and the *Mathews v. Eldridge* balancing-of-interests inquiry—as a question of law—is circumvented altogether.

Before the trial court permitted the jury to determine whether the hearing was meaningful, it was obligated to decide: meaningful for what purpose? Is the hearing intended to provide the employee with an opportunity to change the decision-maker's mind about whether to discharge

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[11] The Ninth Circuit's failure to mention or distinguish *Baden v. Koch* is perplexing. Both parties extensively briefed and argued the application of *Baden* to the facts and circumstances of this case.

the employee? Is the purpose to change the decision-maker's mind about what should be said in announcing the action? Or, is the purpose to provide the employee with a forum to tell his side of the story, so that both his case and the government's are aired? If the latter is the objective, is the point to make sure the government's file or understanding is complete, or that the public hears the response? Without answers to those questions, "meaningfulness" has no reference point. Without a reference point, a court on motion for directed verdict cannot decide the minimum requirements of due process for the timing of the hearing, the adequacy of the notice, the predisposition of the decision-maker, and so on. In turn, a jury cannot decide whether factually those minimums were satisfied.

The procedural substance of a constitutionally adequate "name-clearing hearing" is less than certain. This Court has declared that government must afford a name-clearing hearing for an unconstitutional deprivation of a liberty interest in reputation. *See, e.g., Codd v. Velger*, 429 U.S. at 627 (quoting *Board of Regents v. Roth*, 408 U.S. at 573 & n. 12). But this Court has not identified the contents of that hearing and its precise purpose. Whatever the purpose of a name-clearing hearing, sound constitutional analysis must define its contents with greater precision, as a matter of law.

The Ninth Circuit alone permits the jury to be the exclusive judge of what process government owes an employee to clear his name. Other circuits have resolved, as a matter of law, certain aspects of what is or is not due an at-will employee when government invades a protected liberty interest in reputation. Those that have addressed the question uniformly have held that a liberty interest hearing does not encompass a right to summon or subpoena witnesses. *Boston v. Webb*, 783 F.2d 1163, 1167 (4th Cir. 1986); *Rosewitz v. Latting*, 689 F.2d

175, 177 (10th Cir. 1982). The circuit courts also agree that the hearing may be informal; indeed, it may simply involve a written response to the charges. *See Dickson v. Office of Personnel Management*, 828 F.2d 32, 41-42 (D.C. Cir. 1987); *Perry v. F.B.I.*, 781 F.2d 1294, 1303-04 (7th Cir.), *cert. denied*, 479 U.S. 814 (1986); *Baden v. Koch*, 799 F.2d at 831-33. The circuits also appear to agree that, as a matter of law, the hearing need not precede publication of the stigmatizing comment. *Campbell v. Pierce County, Ga.*, 741 F.2d 1342, 1345 (11th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *In re Selcraig*, 705 F.2d 789, 796 (5th Cir. 1983); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981); *see Rodrigues de Quinonez v. Perez*, 596 F.2d 486 (1st Cir.), *cert. denied*, 444 U.S. 840 (1979), *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1007 n. 4 (D.C. Cir. 1985).

The fact that Brady tried to cast his procedural objections as bases on which to infer the hearing was a "sham" or Gebbie was "biased" did not permit the court to submit all questions of process to the jury. If, as a matter of law, a written opportunity to respond is constitutionally adequate, this jury was not free to decide it was not. If, as a matter of law, a decisionmaker's involvement in investigating misconduct and preliminarily deciding what action to take does not violate due process, this jury was not free to conclude that Gebbie was unconstitutionally "biased" by her initial decision to discharge. *Cf. Withrow v. Larkin*, 421 U.S. 35 (1975) (doctor is not deprived of due process when licensing board investigates him, concludes on basis of investigation doctor should be sanctioned and then adjudicates questions of whether and what sanctions to impose). The Ninth Circuit's approach thus is sharply inconsistent with that of several other circuits and this Court, and it is flatly wrong.

III. Gebbie was entitled to qualified immunity because she acted in unquestioned good faith and the law concerning liberty interests and name-clearing hearings is far from settled.

In light of the foregoing discussion of Brady's liberty interest and due process claims, the Ninth Circuit's conclusion that the law in these areas is well-settled is nothing short of remarkable. No decision by this Court, and very few decisions by lower courts, have even tackled the question of whether or when prominent public officials may assert a liberty interest for defamation in connection with a discretionary discharge. However, holdings in closely related contexts, such as government's ordinary tort liability for its comments or the media's liability for its reporting, suggest that the circumstances of Gebbie's announcement in this case did not violate Brady's constitutional rights.

Even if existing law clearly defines the scope of a public official's liberty interest in reputation, the process due is far from certain. Most circuits have concluded that informal procedures, provided after the discharge decision and limited to written response to the charges, suffice. *See discussion supra* at pp. 26-27. Most of these decisions have involved a variety of lower echelon public employees, not highly placed executive branch officials with media recognition and access. In this more narrow context, the Second Circuit's decision in *Baden v. Koch*, 799 F.2d 825, is closely on point. There the court came close to supporting a conclusion that no process whatsoever was due. However, the easier answer was that, as a matter of law, the process Baden received (an opportunity to respond to some charges in writing and to others by speaking to the press) was all that was due.

Thus, to the degree the law is settled, Gebbie provided Brady with all the process the Constitution guarantees him. Yet, the Ninth Circuit approached the question from a

radically different perspective and disagreed. It first found that settled law gives Brady a constitutionally protected interest in his reputation under these circumstances. 859 F.2d at 1556. It next found that the "fundamental requirement of due process was the opportunity to be heard at a meaningful time and in a meaningful manner." *Ibid.* What is or is not meaningful is to be argued case-by-case, with the jury applying the *Mathews v. Eldridge* factors and determining after the fact whether the process given was the process due.

Under the Ninth Circuit's approach, there are no constitutional minimums for a name-clearing hearing. Thus, no administrator can know in advance, nor can any government attorney advise, that a particular form or timing of pre-hearing notice will suffice; a jury may think that ten days' notice, rather than seven, would have been more "meaningful." No administrator or government attorney can safely predict that an opportunity to respond in writing or through a press conference is an adequate opportunity for a public official to "clear his name;" a jury may think that a face-to-face meeting is the only meaningful way to approach the decision-maker. Yet, no administrator can be assured that even if the discharged official, accompanied by counsel, receives an informal opportunity to present evidence directly to the administrator, a jury will not later conclude that a public trial-type hearing was what was needed in a particular case. Finally, no administrator can safely exercise discretion to grant or deny a continuance, because a jury, long after the fact, may conclude there would have been no harm in waiting one week longer, or one week more after that.

The Ninth Circuit is correct when it says that the law "clearly established that what process is due in any case is determined by application of the three-pronged test in *Mathews v. Eldridge*" and that the hearing must be "meaningful." 859 F.2d at 1556. However, the fact that the law provides a settled formula for determining what procedures are due in a

particular case does not mean that the particular procedures due also are well established. *See, e.g., Davis v. Scherer*, 468 U.S. 183, 191-92 and n. 10 (1984); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert denied*, 479 U.S. 848 (1986). The Ninth Circuit's error is particularly egregious in light of the decisions in *Baden v. Koch*, *Perry v. F.B.I.*, and *Dickson v. Office of Personnel Management*, which hold that due process only requriesthe opportunity to file a written refutation of the charges. Even if these three circuits are wrong, it cannot be said—in light of their holdings—that Gebbie knew or should have known that the procedures she offered Brady violated clearly established law.

CONCLUSION

The Ninth Circuit's decision in this case has serious ramifications for all levels of government and all public employers. The decision below denies public employers both guidance as to what the Constitution requires and protection when there is no guidance. In a context as important as government's responsiveness to the performance of its high-level officials and its ability to speak to the public it serves, placing government in such an untenable position, is unsound as a matter of constitutional law and policy. Government is entitled either to know with greater certainty what the Constitution requires, or to immunity for its good faith efforts to comply with the Constitution's demands. This Court, accordingly, should grant this petition for writ of certiorari and reverse the Ninth Circuit's judgment.

Respectfully submitted,

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APPENDIX A

William J. BRADY, M.D.
Plaintiff-Appellee,
Cross-Appellant,
v.
Kristine M. GEBBIE,
Director, Human Resources,
Administrator, Health Division
of the State of Oregon,
Defendant-Appellant,
Cross-Appellee.

Nos. 87-3839, 87-3877.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 11, 1988.
Decided Oct. 31, 1988.

Michael D. Reynolds, Asst. Atty. Gen., Salem, Or., for defendant-appellant, cross-appellee.

Bernard Jolles, Jolles, Sokol & Bernstein, Portland, Or., for plaintiff-appellee, cross-appellant.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN, Chief Judge, ALARCON and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

Kristine M. Gebbie ("Gebbie") appeals from the district court order denying her motions for directed verdict and JNOV as to the liberty interest claim of William J. Brady, M.D. ("Brady"). Gebbie argues that the undisputed evidence shows that 1) Gebbie did not deprive Brady of a constitutionally protected liberty interest; 2) Brady received all the process he was due; and 3) Gebbie was protected by qualified immunity. Gebbie also appeals the denial of her motion for a

new trial or remittitur on the grounds that the jury's award of damages was not supported by the evidence and was excessive and grossly disproportionate.

Brady cross-appeals from the district court's grant of a directed verdict for Gebbie on Brady's property interest claim. Brady argues that he had a constitutionally protected property interest in both his unclassified position as State Medical Examiner and his alleged right to return to classified service after termination of his unclassifed job. He also appeals the district court's grant of partial summary judgment for Gebbie on the issue of his right to reinstatement. We affirm the decision of the district court on all of the issues.

I.

Brady, a board-certified hospital, clinical and forensic pathologist, was hired as Deputy Medical Examiner for the State of Oregon on January 1, 1969. In May, 1969, he became the State Medical Examiner. At that time, the position of State Medical Examiner was in the classified civil service. In January, 1977, the position was taken out of classified service and placed in management service; in September, 1977, the position was moved to the unclassified service.

From 1969 until January, 1979, Dr. Edward Press was Brady's supervisor. Dr. Press was succeeded by Gebbie, who remained Brady's supervisor until his discharge in October, 1985. At all times during his employment as State Medical Examiner, Brady received satisfactory or better evaluations from his supervisors. In addition to performing his official duties, Brady maintained a private practice, taught, and testified as an expert witness on numerous occasions.

On June 20, 1985, Brady was interviewed by a newspaper reporter who told him that she had information that he was selling body parts to finance parties in the morgue. After the interview, Brady called Gebbie and arranged to meet with her

at her home that evening. At that meeting, Brady informed Gebbie about the interview. He also told her about a bank account which he had started while a county coroner and continued to keep after becoming State Medical Examiner. The unsolicited funds for the account apparently came primarily from small amounts of money forwarded to the coroner's office by the National Pituitary Foundation.[1] Though the funds were deposited into an account in Brady's name, they were used for various amenities for the Medical Examiner's Office. The account was openly kept; all of the employees in the office knew about it. Gebbie refused Brady's offer to resign at that time, but agreed to meet with him after she met with the State Attorney General the next day.

On June 21, 1985, Gebbie learned from the Attorney General that there was a pending criminal investigation against Dr. Brady. One area of the investigation concerned the account Brady had discussed with Gebbie. Gebbie met with Brady later that day and again refused his offer to resign. She then gave him a letter of suspension and informed him that he was suspended without pay pending an investigation into charges of misuse of public funds. Gebbie also issued a press release in which she stated that 1) Brady had been suspended "pending a Department of Justice investigation into allegations that miscellaneous fees coming to the Medical Examiner's office were put into a special account, apparently for the purchase of office amenities"; 2) Brady had reported to Gebbie that the fund was set up to help with office extras and had been in existence for years; and 3) the Department of Justice was conducting an impartial investigation into the matter.

After the suspension, Brady was the subject of extensive—and often unfavorable—press coverage. On Sep-

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[1] The money was intended as reimbursement for the costs involved in shipping pituitary glands that had been removed during autopsies and donated to the foundation.

tember 17, 1985, the Attorney General issued a report which concluded that criminal sanctions against Brady were not warranted. On September 25, 1985, Brady, his attorneys Ronald Hoevet and Judy Snyder, and Dr. Homer Harris, the former Chairman of the State Medical Advisory Board, met with Gebbie. After Brady refused to resign, Gebbie handed him a letter of proposed termination.

The letter charged Brady with violating various state and departmental policies and accounting procedures by 1) using the proceeds given in reimbursement for specimens and autopsy report transcriptions to establish and maintain a "slush fund" for office parties and amenities; 2) using state and county facilities to conduct private autopsies for personal gain and in violation of conflict of interest policies; and 3) causing the state to be billed and to pay for toxicological reports made in connection with private autopsies which Brady performed. The letter also stated that on October 2, 1985, Brady would have the opportunity to come to Gebbie's office with his attorney to respond to the charges, and present mitigating or rebuttal information. Gebbie then issued a press release about the proposed termination.[2]

Brady's attorney subsequently asked Herb Hirst, a Health Division employee, for a continuance of the forthcoming meeting. Hirst responded that the meeting was being held as a courtesy and indicated that Brady would not be allowed to summon or subpoena witnesses.

The meeting was held in Gebbie's office on October 2, 1985 and was attended by Gebbie, Brady, Brady's attorneys, Dr. Harris, and Brady's wife. Gebbie asked Brady for specific information regarding whether he had used particular state-owned equipment when he performed private autop-

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[2] Gebbie also included information about the concurrent proposed discharge for related charges of a colleague of Brady's, Dr. Larry Lewman. Dr. Lewman was retained, however, after he met with Gebbie.

sies. Brady stated that in order to answer her questions he needed time to check his records. He asked for a continuance to gather the necessary information to outline his reponse to the charges. Gebbie denied the request. She also denied Brady's request for a fair and public hearing.

The next day, October 3, 1985, Gebbie discharged Brady. The letter of discharge stated as the reasons for Brady's termination the same charges as were contained in the earlier letter of suspension. Gebbie also issued a press release in which she stated, *inter alia*, that Brady, "through his systematic 16-year diversion of public funds" had "knowingly violated public trust and confidence." She further stated that "[t]rust and confidence in Oregon State Government cannot be restored if Dr. Brady continues to work."

Gebbie's press release also stated that the findings of a comprehensive investigation by the Attorney General revealed four major areas of violations that led to Brady's dismissal. Those areas were identified as: 1) establishing a private autopsy business that Brady conducted from the State Medical Examiner's Office—using state employees working at the state's expense—and depositing the payments received into his personal and private bank acccounts; 2) collecting and depositing into his private bank accounts payments received from the federal government for private autopsies which Brady had performed for federal agencies, when such services should have been done by the state and at state expense; 3) diverting and placing into a private bank account $16,000 of the state's money and using it for "lunches, staff parties, coffee, and other items not authorized by state government regulations"; and 4) using state contracted laboratory services for Brady's private autopsy business while charging the state for them.

On October 4, 1985, Brady's attorney delivered to Gebbie a seven-page letter which detailed Brady's response to the

charges. On October 21, 1985, Gebbie informed Brady's attorney by letter that her decision to terminate Brady was unchanged.

Brady subsequently filed suit in the United States District Court for the District of Oregon, pursuant to 42 U.S.C. § 1983, for monetary damages and reinstatement. Brady contended that in discharging him from public employment, Gebbie deprived him of his constitutionally protected property and liberty interests without due process of law. On November 4, 1986, the district court granted Gebbie's motion for partial summary judgment on the issue of reinstatement.

At the close of evidence, the court granted Gebbie's motion for a directed verdict on the property interest claims. The liberty interest claim was submitted to the jury, which returned a verdict in favor of Brady for $300,000. The court denied Gebbie's motions for JNOV, new trial, and remittitur. Gebbie timely appealed and Brady timely cross-appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Brady contends that the district court erred in directing a verdict for Gebbie on his property interest claim. He argues that, based on a mutual understanding or implied contract, he had a constitutionally protected property interest in his unclassified position as State Medical Examiner. He also argues that he had a statutorily created right to return to classified service after his discharge from unclassified service. We find Brady's arguments unpersuasive.

A.

In determining the propriety of a directed verdict, this court has the same role as the court below. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied* 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). A directed verdict is proper if, believing the evidence of the non-movant and

drawing all justifiable inferences in his favor, there is only one reasonable conclusion as to the verdict. *Anderson v. Liberty Libby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986); *Peterson*, 771 F.2d at 1256. A district court's conclusions regarding state or federal law are reviewed de novo. *In Re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

B.

The Fourteenth Amendment protects against the deprivation of property or liberty without procedural due process. *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978). Brady only has a constitutionally protected property interest in continued employment, however, if he has a reasonable expectation or a "legitimate claim of entitlement" to it, rather than a mere "unilateral expectation." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). A legitimate claim of entitlement arises if it is created by "existing rules or understandings that stem from an independent source such as state law." *Id.* Thus "[s]tate law defines what is and what is not property" that is subject to the due process clause of the Fourteenth Amendment.[3] *Dorr v. County of Butte*, 795 F.2d 875, 876 (9th Cir. 1986) (citing *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709). Brady therefore could only have a property interest in his job as State Medical Examiner if Oregon law created such a right.

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[3] Though state law creates a property interest, not all state-created rights rise to the level of a constitutionally protected interest. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978) ("Although the underlying substantive right is created by 'an independent source such as state law,' federal constitutional law determines whether that interest arises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.") (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972)).

A state law which limits the grounds upon which an employee may be discharged, such as conditioning dismissal on a finding of cause, creates a reasonable expectation of continued employment, and thus a protected property right. *Dorr*, 795 F.2d at 878. Where state employees serve at the will of the appointing authority, however, there is no such reasonable expectation of continued employment, and thus no property right. *Id.*

In Oregon, the statutory scheme divides state employees into two major categories of service: classified and unclassified.[4] *See* Or. Rev. Stat. §§ 240.195-240.210; *Papadopoulos v. Oregon State Bd. of Higher Educ.*, 14 Or. App 130, 157, 511 P.2d 854, 867 (1973), *cert. denied*, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 224 (1974). Employees who have successfully completed a statutory probationary period to become permanent or "regular" employees in classified service can only be fired for cause. Or. Rev. Stat. § 240.560(4); *Papadopoulos*, 14 Or. App. at 157, 511 P.2d at 867. State employees in unclassified service are "probationary"[5] or untenured, and thus have no job security. *Papadopoulos*, 14 Or. 157-58, 511 P.2d at 866-67. There is no statutory provision that employees in unclassified service can be fired only for cause. In fact, Or. Rev. Stat. § 240.240(1) provides that, with the exception of laws, rules and policies concerning salary and leave with pay, the provisions of Chapter 240 of

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[4] The two other classifications are exempt and management service. *See* O.R.S. 240.200 and O.R.S. 240.212. We do not discuss either here since they are not at issue in Brady's case.

[5] As used by the court in *Papadopoulos*, the term "probationary" employees includes both temporary probationary employees, i.e., employees who filed a classified position but has not yet successfully completed the statutory probationary period, and permanent probationary employees, i.e., "public employees [who] are in positions for which no provision has been made for ever acquiring permanent job security." 14 Or. App. at 167-68, 511 P.2d at 871. Unclassified employees such as Brady fall within the latter category.

Oregon Laws—which include statutes mandating discharge for cause only as well as a right to a hearing—do not extend to employees in unclassified service.[6]

Under this scheme, only regular employees in classified service have a property right to continued employment. *Papadopoulos*, 14 Or. App. at 157-58, 511 P.2d at 867; *See also Simpson v. Western Graphics Corp.*, 53 Or. App. 205, 210, 631 P.2d 805, 808 (1981), *aff'd*, 293 Or. 96, 643 P.2d 1276 (1982) (property right is created by public employment when coupled with job protection). Employees in unclassified service can be discharged for any reason and have no right to a hearing. *Papadopoulos*, 14 Or. App. at 157-58, 167-68, 511 P.2d at 866-67, 871-72. They "have no property interest" in continued employment.[7] *Id.* 14 Or. App. at 157-58, 511 P.2d at 871-72.

Brady concedes that when he was discharged his position as State Medical Examiner was in the unclassified service. He admits that Or. Rev. Stat. § 240.240(1)—which governs employees in unclassified positions—does not contain lan-

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[6] Or. Rev. Stat. § 240.240(1) provides:

> The unclassified service . . . shall not be subject to this chapter, except that employes and officers in the unclassified . . . service shall be subject to the laws, rules and policies pertaining to any type of leave with pay except as otherwise provided in subsection (4) and (5) of this section, and shall be subject to the laws, rules and policies pertaining to salary plans except as otherwise provided in subsections (3) and (4) of this section. As amended, 1985 Or. Laws, ch. 121 § 1.

[7] An exception is made for employees who left classified service to take a job in the unclassified service and were subsequently discharged from their job in the unclassified service for reasons other than those set forth in Or. Rev. Stat. § 240.555. *See* Or. Rev. Stat. § 240.570 and discussion *infra* at II-C. Such employees have a right to return to classified service at the conclusion of their job in the unclassified service. *Id.* That right does not extend to employees such as Brady whose *position* has been moved from classified to unclassified service. *Id.*

guage that such employees can be discharged either at will or only for cause. He argues, however, that the absence of these statutory provisions does not prohibit him from showing that he had a property interest created outside of the statute, i.e. by an implied contract or mutually explicit understanding that he would not be fired absent such cause. This argument lacks merit.

"[I]n Oregon, public employe tenure rights arise *solely* from statutes or . . . regulations adopted pursuant to a statutory delegation of authority." *Papadopoulos*, 14 Or. App. 168, 511 P.2d at 872 (emphasis added). The court in *Papadopoulos* held that it is these rights, based on statute or regulation, which create property interests. *Id.*

The court ruled out the possibility that property interests for public employees in Oregon could arise solely from an implied or express contract of employment absent some underlying statute or regulation.[8] *Id.* at 168-69, 511 P.2d at 872. Therefore, even if Brady could show an implied contract of employment that he could only be fired for cause, he could not assert a property right based on that contract unless the contract was made pursuant to a statute or authorizing regulation. *See id.* Moreover, though the court in *Papadopoulos* did not specifically address property rights arising from mutual understandings, the language of the opinion makes clear that Brady also could not show a property interest based on such a theory absent a showing of statutory authorization for Gebbie to enter into such an agreement.

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[8] Brady relies upon *Swanson v. Van Duyn Chocolate Shops, Inc.*, 282 Or. 491, 579 P.2d 239 (1978) and *Yartzoff v. Democrat-Herald Publishing Co., Inc.*, 281 Or. 651, 576 P.2d 356 (1978) for support. These cases only addressed implied contracts in the context of private employment; neither involved a state or public employee whose employment was governed by statutes. The reasoning in those cases is therefore not applicable to the instant case.

Brady does not point to any such authority. Instead he merely argues that the absence of "at will" or "only for cause" language in Or. Rev. Stat. § 240.240 shows Gebbie to create an implied contract or a mutually explicit understanding. The statute, however, cannot be interpreted in isolation. *See Trivoli v. Multnomah County Rural Fire Protection Dist. No. 10*, 74 Or. App. 550, 555, 703 P.2d 285, 288 (1985) (refusing to interpret a statutory provision of state civil service code by reference to that section alone). Rather, it must be looked at with reference to the entire statutory scheme. *See id.* (reading provision concerning probationary employee in context with other provisions providing procedural protections to permanent employees).

It is clear from the entire statutory scheme governing Oregon state employees—i.e., Chapter 240—that the state intended that employees in classified service could not be discharged absent cause while employees in unclassified service, such as Brady, could be discharged at will. The state could have given unclassified employees such as Brady the same benefits as classified employees. *See Papadopoulos*, 14 Or. App. at 168, 511 P.2d at 872 n. 10. With the exception of salary plans and leave with pay provisions, however, it has not done so. *See* Or. Rev. Stat. § 240.240(1). Brady's reasoning would render this statutory scheme—and its distinctions between classified and unclassified employees—a nullity. *Cf. Trivoli*, 74 Or. App. at 554-55, 703 P.2d at 288 (in light of other statutory provisions, property interest in continued employment did not apply to probationary employee, despite statutory provision that appeared to hold otherwise).

Moreover, in 1977, the state moved the State Medical Examiner position from classified to unclassified service. In doing so it removed the protections associated with classified service, including the requirement that the state discharge

employees holding positions in classified service only for cause. Allowing administrators such as Gebbie to make agreements with employees would defeat the state's reclassification of positions. It is not plausible that the state would give Gebbie implied power to enter into an understanding with Brady—as he argues—when the "understanding" would allow her to effectively overrule the legislature.

We therefore find that as a matter of Oregon law, Brady could not prevail on his claim of a property interest based on a mutual understanding or implied contract.[9]

C.

We also find that Brady could not prevail on his contention that Or. Rev. Stat. § 240.570 gave him a property right to return to classified service after he was discharged from unclassified service.

At the time of Brady's discharge in 1985, Or. Rev. Stat. § 240.570 provided:

> Positions in the unclassified . . . service[] may be filled by classified employes. After termination of unclassified . . . service, for reasons other than specified by ORS 240.555, an employe formerly in the classified service shall be restored to a position in the same agency and in the same class as the position last held in the classified service. As amended, 1985 Or. Laws, ch. 121 § 3.

As Gebbie concedes, this statute creates a property right to return to classified service. *See Alexander v. City of Menlo Park*, 787 F.2d 1371, 1374 (9th Cir. 1986) *cert. denied*, 479 U.S. 1032, 107 S.Ct. 879, 93 L.Ed.2d 833 (1987) ("bumping" rights of employees are a constitutionally protected property inter-

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[9] Brady also argues that the district court erred in holding that a directed verdict was also proper since Brady did not present sufficient evidence of a mutual understanding. Because we hold that a mutual understanding claim was not available to Brady, we need not address this additional argument.

est). On its face, the statute applies to employees who have left a position in classified service to fill an existing position in unclassified service.

Brady contends that under the plain language of the statute, it also applies to persons whose *position* has been reclassified, i.e. moved from classified to unclassified service. If anything, however, the statutory language that "positions in the unclassified service . . . may be filled by classified employees" appears to exclude employees like Brady, who filled a position the legislature has removed from classified and placed in unclassified service. Moreover, the legislative history of Or. Rev. Stat. § 240.570, when read in conjunction with another statute which was repealed in 1979—Or. Rev. Stat. § 240.572—supports this interpretation.

In 1977, the Oregon legislature moved a number of positions from classified to unclassified service. At the same time, the legislature enacted Or. Rev. Stat. § 240.572, which provided

> An employe whose position is placed in the unclassified service pursuant to section 1 of this 1977 Act shall, after termination of service in the unclassified position, be restored to his or her status in the classified service in accordance with rules adopted by the division. 1977 Or. Laws, ch. 271 § 3.

At that time, Or. Rev. Stat. § 240.570 provided:

> Positions in the unclassified . . . service may be filled by classified employes upon request of the appointing authority. Any classified employe so appointed shall, after termination of service in an unclassified or exempt position, be restored to his status in the classified service. *See* 1955 Or. Laws, ch. 738 § 6.

Both Or. Rev. Stat. §§ 240.570 and 240.572 created a right to return to classified service for employees whose unclassified service was terminated. They applied, however, to different

circumstances. Or. Rev. Stat. § 240.570 applied to employees who had left a position in classified service to fill an existing unclassified position, while Or. Rev. Stat. § 240.572 applied to employees whose position had been moved from the classified to the unclassified service. *See Fajer v. Dept. of Human Resources*, 51 Or. App. 105, 110, 625 P.2d 140, 142-43, *rev. denied*, 291 Or. 151, 634 P.2d 1345 (1981) (noting differences between situations covered under Or. Rev. Stat. §§ 240.570 and 240.572). Thus, a state employee like Brady whose position had been moved from classified to unclassified service, fell within Or. Rev. Stat. § 240.572 and not § 240.570.

In 1979, the legislature repealed Or. Rev. Stat. § 240.572. *See* 1979 Or. Laws, ch. 468 § 1. It also amended Or. Rev. Stat. § 240.570. *See* 1979 Or. Laws, ch. 468 § 18. The amendment to Or. Rev. Stat. § 240.570, however, did not add any language similar to that contained in Or. Rev. Stat. § 240.572, but kept intact its former language that "positions in the unclassified . . . service may be filled by classified employees." Thus, even after the amendment, Or. Rev. Stat. § 240.570 still did not cover employees such as Brady whose *position* had been moved from classified to unclassified service, i.e. those employees in circumstances formally protected by Or. Rev. Stat. § 240.572. Since only Or. Rev. Stat. § 240.570 was in effect when Brady filed his lawsuit—and since it did not apply to Brady—his argument that he had a statutorily created property right to return to classified service after his discharge from unclassified service is without merit.

D.

Thus, as a matter of Oregon law, Brady did not have a constitutionally protected property interest in his unclassified position as State Medical Examiner and did not have a statutorily created right to return to classified service after his

discharge. The district court therefore did not err in directing a verdict for Gebbie on Brady's property interest claim.

III.

Brady also argues that the district court erred in granting Gebbie's motion for summary judgment on the issue of whether Brady was entitled to seek reinstatement. Brady does not argue that there were material issues of fact that should have gone to a jury on this issue. Rather, he contends that the district court erred in holding, as a matter of law, that reinstatement was not an appropriate remedy for a due process violation.

A.

A district court's grant of summary judgment is reviewed de novo. *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1407 (9th Cir. 1987). Summary judgment is proper if the record, viewed in the light most favorable to the non-moving party, shows that no genuine issues of material fact exist and that the moving party was entitled to judgment as a matter of law. *Id.* The district court's interpretation of state and federal law is also reviewed de novo. *Id.*

B.

This court and the Supreme Court have repeatedly held that the appropriate remedy for deprivation of a liberty and/or property interest without due proces is to order the process that was due and any attendant damages which directly resulted from the failure to give the proper procedure. *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 778 n. 8 (9th Cir. 1982); *see also Carey v. Piphus*, 435 U.S. at 259-64, 98 S.Ct. at 1051-52; *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 884 51 L.Ed.2d 92 (1977) ("remedy mandated by the Due Process Clause of the Fourteenth Amendment" for

claim based on stigmatization during discharge from employment is a name-clearing hearing); *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707. Brady contends, however, that this court has also found that in certain circumstances, reinstatement might be appropriate for deprivation of property without due process. He cites to *Burton v. Cascade School Dist. Union High School No. 5*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839, 96 S.Ct. 69, 46 L.Ed.2d 59 (1975), and *Cain v. McQueen*, 580 F.2d 1001 (9th Cir. 1978), for support. His reliance on those cases, however, is misplaced.

Unlike Brady's case, both *Cain*, and *Burton* involved an undercurrent of first amendment claims intertwined with a due process claim. *See Cain*, 580 F.2d at 1005 (plaintiff alleged that she had been fired in part for speaking out; thus, her claim was "strikingly similar" to cases involving First Amendment claims); *Burton*, 512 F.2d at 851 (statute under which a teacher was fired was held by the district court to be unconstitutionally vague). We agree with these cases that there may be a right to reinstatement when another substantive right coexists with the right to procedural due process. *See Burton*, 512 F.2d at 853 & n. 3 (noting that the "extraordinary equitable remedy" of reinstatement has been imposed in situations involving the legal exercise of free expression or racial discrimination). Brady, however, has not alleged another such right, but solely alleged his right to due process. We refuse to adopt his argument that reinstatement is an available remedy in such a case. *Burton* and *Cain* do not require us to do otherwise. The district court therefore did not err in ruling that reinstatement was not an available remedy for his claims and granting partial summary judgment to Gebbie on this issue.

IV.

The district court did not state the grounds for its denial of Gebbie's motion for a directed verdict or JNOV on Brady's

claim that Gebbie deprived him of liberty without due process. Gebbie argues that the district court erred in denying her motion because an at-will employee such as Brady cannot have a liberty interest implicated in the context of termination from employment. She also argues that, based on the evidence, Brady could not show that she deprived him of a liberty interest that was protected by the due process clause. In the alternative, Gebbie contends that she gave Brady all of the process that he was due. We do not find any of these arguments to be persuasive.

A.

A denial or grant of a motion for JNOV is reviewed under the same standard as a directed verdict, i.e. "whether the evidence, viewed in the light most favorable to the non-moving party, permits only one reasonable conclusion with respect to the verdict." *Locricchio v. Legal Services Corp*, 833 F.2d 1352, 1356 (9th Cir. 1987). A directed verdict is not appropriate if there is substantial evidence to support a verdict for the non-moving party. *Peterson*, 771 F.2d at 1256.

B.

"[A] liberty interest is implicated in the employment termination context if the charge impairs a reputation for honesty or morality." *Matthews v. Harney County, Or., School Dist. No. 4*, 819 F.2d 889, 891 (9th Cir. 1987). In order to trigger the procedural protections of due process attendant to a properly presented liberty interest claim, a plaintiff must show that "1) the accuracy of the charge is contested; 2) there is some public disclosure of the charge; and 3) the charge is made in connection with termination of employment." *Id.* at 891-92; *see also Jones v. Los Angeles Community College Distr.*, 702 F.2d 203, 206 (9th Cir. 1983); *Vanelli*, 667 F.2d at 777-78. All of these elements were included in the instructions given to the jury in Brady's case. The jury also was told

explicitly that it had to find that the charges against Brady were false.

Gebbie first contends that, since Dr. Brady's position was in the unclassified service, he was an at-will employee. She then argues that no liberty interest could be implicated—and no hearing is necessary—when an at-will employee is stigmatized during the course of discharge from employment. Thus she argues that Brady has not been deprived of a liberty interest and is not entitled to due process even if he was stigmatized in the course of termination from his job as State Medical Examiner. This argument is without merit.

Gebbie relies on *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), for support. The Court in *Paul*, however, only held that reputation alone "apart from some more tangible interests such as employment" is not a liberty interest. *Id.* at 701, 96 S.Ct. at 1161. It never even discussed limits on the rights of an at-will employee to assert a liberty interest claim.

Moreover, subsequent cases from the Supreme Court and this circuit have held that a nontenured government employee has a liberty interest and is entitled to a name-clearing hearing "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination." *Codd*, 429 U.S. at 628, 97 S.Ct. at 884; *see also Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1495 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). Thus, while Brady's position in the unclassified service—or his at-will employment—bars his property claim, as discussed *supra*, it does not preclude his liberty claim. *See Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1317 (9th Cir. 1984) (failure to prevail on property claim will not preclude a properly asserted liberty claim).

Gebbie's other argument, i.e., that no reasonable jury could have found for Brady on the liberty interest issue, is

equally without merit. Based on the evidence presented at trial, the jury could reasonably have found that Brady's discharge by Gebbie implicated a liberty interest, and that Brady was entitled to procedural due process.

Brady presented undisputed evidence that Gebbie charged him with 1) violating the public trust, 2) diverting state funds for his own use, 3) establishing a "slush fund", 4) causing the state to be billed for toxicological reports made in connection with private autopsies he performed, and 5) causing the federal government to be billed instead of the state government. These charges involved accusations of dishonesty which were sufficient to implicate a liberty interest. *See Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983) (charges that government physician received payment for services he did not render, made in connection with termination of employment, rise to level of implicating a liberty interest).

In addition, there was sufficient evidence presented from which a jury could reasonably infer that the charges were both contested and false. Brady testified that he contested the charges contained in his letter of termination. He also stated that the money in the so-called "slush fund" was used for state and not private purposes and the fund was openly kept. In addition, Brady testified that he instructed his secretaries to type up his autopsies on their own time, did not cause the state to be billed for toxicology reports performed in connection with his private autopsies, and billed the federal government for autopsies done on certain federal cases because they were done under the federal government's jurisdiction.

There also was testimony from Brady's colleague, Dr. Lewman, that he had also performed private autopsies, that no one had informed him—nor was he aware—that the practice would violate conflict of interest rules, and that the staff was instructed to write up private autopsy reports on their own time. Dr. Lewman also testified that there was no advan-

tage to billing toxicological reports from private autopsies to the state as it would ordinarily be billed to the party for whom the service was performed, and that Brady had never arranged for the state to be billed for such reports. Another witness, Dr. Krasselt, testified that the toxicology billings could have resulted from inadvertent error. Based on this evidence alone, a jury could rationally infer that at least some—if not all—of the charges against Brady were false.

A jury could also reasonably find that the charges were published by Gebbie and made in the course of Brady's termination from employment. There was unconstroverted evidence that Gebbie made these charges against Brady in connection with his suspension without pay and his discharge, and that she included these charges in press releases and statements made to the press.

Thus, there was evidence from which a jury could reasonably infer that Gebbie 1) charged Brady with conduct that impaired his reputation for honesty; 2) publicly disclosed the charges; and 3) the charges were in connection with Brady's termination from employment. *Matthews*, 819 F.2d at 891-92. Since there was evidence presented from which a reasonable jury could find that Gebbie deprived him of a constitutionally protected liberty interest, and since Brady's status as an unclassified employee did not preclude his asserting a liberty claim, the district court did not err in denying Gebbie's motions for a directed verdict and JNOV on this issue.

C.

The district court also did not err in refusing to direct a verdict for Gebbie on her claim that even if she deprived Brady of a liberty interest, she gave him all the process that was due.

As Gebbie concedes, the fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319,

333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). At a minimum, due process requires notice and a hearing where the individual has a meaningful opportunity to confront the evidence against him. *Vanelli*, 667 F.2d at 780. To determine what process is due in an individual case—and if it is due before or after the deprivation of a constitutionally protected interest—a court must apply the three-part interest test set out in *Mathews v. Eldridge*, 424 U.S. at 334-35, 96 S.Ct. at 902. That test balances 1) the private interest that will be affected, 2) the risk of an erroneous deprivation of that interest through the procedures used, and 3) the additional cost and administrative burdens that additional procedures would entail. *Id.* Thus, although a hearing where the individual has an opportunity to rebut the charges against him is always required in due process cases, when the hearing must be held and what procedural protections must be given at the hearing are determined on a case-by-case basis.

Where a person has been deprived of a liberty interest without due process, the hearing required must provide the aggrieved party with an opportunity to clear his name.[10] *Codd*, 429 U.S. at 627, 97 S.Ct. at 884. There was

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[10] The jury in Brady's case was given instructions in accordance with all of these principles. It was instructed that Brady had to prove that he was in fact denied an opportunity to clear his name through notice and a hearing. It was also instructed that:

> Due process requires a fair hearing. The minimum, there must be an opportunity to be heard at a meaningful time and in a meaningful manner. There is no rigid requirements as to the type of hearing a person is entitled.
>
> The nature of the hearing which must be provided depends upon the circumstances of the particular case. The factors to be considered include the private interest that will be affected—that will be the interest of the plaintiff Brady, the risk of erroneous deprivation of that interest through the procedures used and the physical and administrative burdens that any additional procedure requirements would entail.

No objections were made to the instructions.

sufficient evidence presented in the instant case from which a jury could reasonably find that Gebbie did not give Brady even minimal due process, i.e. an opportunity to be heard in a meaningful manner or an opportunity to clear his name. A jury could reasonably infer that even if the October 2, 1985 meeting constituted a "hearing," it did not comport with due process.

Brady testified that on September 21, 1985—prior to the time Gebbie handed him the letter of "proposed" discharge—Gebbie told him "I don't know what in heaven's name you can tell me, Bill, that would make me change my mind." Dr. Harris, who was present at that meeting, also testified that Gebbie told him "I can't conceive of what the reasons will be" in reference to Brady's possible response to the charges. Hoevet testified that he saw Gebbie on a television news program prior to the October 2, 1985 meeting, at which time Gebbie said she couldn't think of what would make her change her mind about terminating Brady. He also testified that prior to the October 2, 1985 meeting, Gebbie wrote a letter to another doctor in which she stated that she had fired Brady. A jury could reasonably infer from this evidence that Gebbie had made up her mind about Brady before the meeting and would have disregarded any evidence which Brady presented in mitigation or rebuttal.

Moreover, there was sufficient evidence presented from which a jury could reasonably infer that Gebbie did not allow Brady sufficient time to prepare for the meeting, and thus did not give him a "meaningful" opportunity to respond to the charges. Several witnesses testified regarding Gebbie's repeated refusal of requests for a continuance of the October 2, 1985 meeting. Hoevet testified that prior to the meeting he had asked Hirst for a continuance, and that the request was refused on September 30, 1985 by one of Gebbie's aides. Dr. Harris testified that he and a group of pathologists had tried to

get both a hearing for Brady and a delay of the meeting. Snyder testified that on the day of the meeting she also requested a delay. In addition, both Harris and Snyder gave testimony that Gebbie had asked specific questions at the October 2, 1985 meeting as to whether Brady had used particular pieces of equipment for private autopsies, and that she had refused Brady's request for a continuance to have time to check his records. A jury could infer from this that the "hearing" was a mere formality and that Gebbie did not give Brady a "meaningful opportunity" to clear his name or be heard. *See Matthews*, 819 F.2d at 893-94 ("[d]ue process of law [is not present] where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard") (quoting *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987)).

The jury could also reasonably infer from the scheduling of the meeting just one week after Brady received the letter of proposed termination, the lack of almost any formal procedures, the setting of the meeting (i.e. Gebbie's office), Hirst's comments regarding witnesses, and Gebbie's persistent refusal to grant a continuance or allow Brady sufficient time to gather evidence to refute the charges, "that the sequence of events rendered the [meeting] meaningless as a pre-termination opportunity to respond." *Matthews*, 819 F.2d at 893. When coupled with the fact that this was the *only* hearing given to Brady—i.e., he was given no post-termination procedures—a jury could have reasonably concluded that Brady had no "opportunity to be heard at a meaningful time and in a meaningful manner" and this was denied even minimal due process. Thus the district court did not err in denying Gebbie's motion for a directed verdict on this issue.[11]

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[11] There was also sufficient evidence from which a jury could reasonably infer that—based on an application of the *Mathews v. Eldridge* factors,

(Footnote continued on next page)

V.

Gebbie also argues that a directed verdict was appropriate on Brady's liberty interest claim since, even if Brady was entitled to more process than he was given, Gebbie is entitled to qualified immunity from Brady's lawsuit. Government officials who perform discretionary functions are generally given qualified immunity from civil damage suits so long as the conduct of the officials "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1211 (9th Cir. 1988); *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2016, 100 L.Ed.2d 603 (1988).

In determining whether the law was clearly established, the contours of the right alleged to have been violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Schwartzman*, 846 F.2d at 1211. This requires more than an alleged "violation of extremely abstrct rights." *Anderson*, 107 S.Ct. at 3038-39; *Schwartzman*, 846 F.2d at 1211. The action in question, however, need not be previously held unlawful. *Anderson*, 107 S.Ct. at 3039; *see also Ostlund*, 825 F.2d at 1374 (specific binding precedent is not required to find that law is clearly established for purposes of qualified immunity analysis). Rather, the unlawfulness must be apparent in light of preexisting law. *Anderson*, 107 S.Ct. at 3039; *Schwartzman*, 846 F.2d at 1211.

Whether at the time of the challenged action the legal norm allegedly violated by an official was clearly established is

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(Footnote continued from previous page)

Brady was entitled to *more* than the minimum procedures. We need not address this issue, though, since we find Brady did not get even the minimum process required.

a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985). Whether a reasonable official would know that she is violating that clearly established law is a question for the jury. *Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988); *see also Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984) (existence of a reasonable belief that official's act is lawful in light of clearly established law is a question for the trier of fact).

The district court did not state the grounds for its refusal to direct a verdict for Gebbie based on the defense of qualified immunity. By denying Gebbie's motion, however, the district court necessarily found that the legal rules were clearly established in this area and that the jury could reasonably find that a reasonable official in Gebbie's position would know that her conduct was in violation of Brady's clearly established constitutional rights.

Gebbie argues that it was error for the district court to deny her motion for a directed verdict on the issue of qualified immunity because the law was not clearly established that Brady had a right to a liberty interest hearing or that the procedures given to Brady did not meet the constitutional requirements of due process.[12]

At the time Gebbie acted in 1985 the law was clearly established that: 1) a liberty interest was implicated when an employee was stigmatized by charges of immoral or dishonest conduct made in the context of discharge from employment, *see Jones*, 702 F.2d at 206; *Vanelli*, 667 F.2d at 777; 2) the due process clause was triggered in such a case if the accuracy of

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[12] Gebbie did object at trial to the instruction on qualified immunity which was given to the jury. She only objected, however, on the grounds that the judge should have told the jury that qualified immunity had both a subjective and objective component. Gebbie's objection was therefore based on an incorrect interpretation of the law, since *Harlow* only allows an objective test.

the charge was disputed, the charge was publicly disclosed, and the charge was made in connection with termination of employment, *see Jones* 702 F.2d at 206; *Vanelli*, 667 F.2d at 777-78; 3) the fundamental requirement of due process was the opportunity to be heard at a meaningful time and in a meaningful manner, *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902; *Orloff*, 708 F.2d at 379; *Vanelli*, 667 F.2d at 779-80; and 4) the minimum process due for deprivation of a liberty interest involving stigmatization during termination of employment was a hearing where the employee has an opportunity to clear his name, *Codd*, 429 U.S. at 627, 97 S.Ct. at 884. The law was also clearly established that what process is due in any case is determined by application of the three-pronged test in *Mathews v. Eldridge*, 424 U.S. at 335, 96 S.Ct. at 903 (balancing the private interest that will be affected, the risk of an erroneous deprivation of that interest through the procedures used, and the additional cost and administrative burdens that additional procedures would entail); *see also Orloff*, 708 F.2d at 379.

Gebbie argues that the law was not clearly established as to the exact procedures due in Brady's case. Specific binding precedent is not required to show that a right is clearly established for qualified immunity purposes. *Ostlund*, 825 F.2d at 1374. Based on the aforementioned preexisting law, the unlawfulness of Gebbie's actions would have been apparent. *See id.* The district court thus did not err in its implicit conclusion that the law was clearly established for purposes of Gebbie's qualified immunity defense.

Gebbie also implies that her actions were reasonable in light of the established law. There was sufficient evidence presented, however, from which a jury could reasonably infer that a reasonable official would know that Brady had a liberty interest that triggered the due process clause and that Gebbie's conduct was violating Brady's constitutional right to the minimum process. *See* discussion, *supra*. The district court

thus did not err in denying Gebbie's motion for a directed verdict based on her qualified immunity defense.

VI.

We decline to address Gebbie's contention that Brady was not deprived of a liberty interest because Gebbie's statements regarding him were all absolutely privileged. Gebbie first raised this issue on appeal at oral argument.[13]

Under Fed. R. App. P. 28(a)(4), the appellant's brief must contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, which citations to the authorities, statutes and parts of the record relied on." Gebbie did not even mention—much less argue—the issue of absolute privilege in either her opening or reply brief.[14] we therefore deem it waived. *See Northwest Acceptance v. Lynnwood Equipment*, 841 F.2d 918, 924 (9th Cir. 1988) (appellants' contention waived because of their failure to provide adequate argument in their opening brief).

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[13] At the time of oral argument, Gebbie also filed, pursuant to Fed. R. App. P. 28(j), a letter of "supplemental authorities" to support her absolute privilege argument. Rule 28(j), however, provides

> When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court . . . setting forth the citations.

Gebbie included the issue of absolute privilege in the pretrial order and argued it in her trial memorandum. That memorandum included citations to two of the four authorities that were listed in the letter of supplemental authorities. Thus, these authorities could hardly have first come to Gebbie's attention *after* her briefs were filed or after oral argument, as is required under Rule 28(j).

It thus appears that Gebbie either simply neglected to include her absolute immunity argument in her briefs or chose to exclude it. In either case, we will not sanction her using Rule 28(j) to alter the situation and raise an issue that has not been briefed—especially when she was aware of the issue as early as the pretrial stage. We thus decline to consider these authoriities.

[14] Moreover, though she discussed it in the pretrial order and her trial memorandum, Gebbie did not raise the issue of absolute privilege in her motions for a directed verdict, JNOV, or new trial.

VII.

Gebbie lastly argues that the district court erred in not granting her motion for JNOV or remittitur on the damages issue. The purpose of awarding damages in a section 1983 case is to compensate the aggrieved party. *Carey*, 435 U.S. at 254-55, 98 S.Ct. at 1047-48. The compensable damages are those actually caused by the denial of procedural due process. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985). These can include damages for mental and emotional distress. *Vanelli*, 667 F.2d at 781.

This court "will not disturb an award of damages on appeal unless it is clearly unsupported by the evidence." *Chalmers*, 762 F.2d at 760. "An otherwise supportable verdict must be affirmed unless it is 'grossly excessive' or 'monstrous' or 'shocking to the conscience.' " *Id.* (quoting *Fountila v. Carter*, 571 F.2d 487, 492 (9th Cir. 1978)). Thus, the jury's award of $300,000 damages to Brady should not be overturned or decreased unless it is clearly unsupported by the evidence of "shocks the conscience."

There was ample testimony by both Brady and his psychiatrist, Dr. Morgenstern, to show the emotional distress and psychological damages Brady suffered and the nexus between these injuries and the deprivation of due process. Dr. Morgenstern testified that Brady was completedly preoccupied by his employment problems and anxious that he would not be able to tell his side of the story. He described a steady worsening of Brady's symptoms over the period from the time of Brady's suspension to several months before trial. Those symptoms included severe and malignant insomnia, anxiety, suicidal fantasies, quiet and severe depression and anxiety. Dr. Morgenstern also testified that Brady suffered from permanent psychological damage and would require treatment for several years. He stated that the failure to get a hearing and the conditions surrounding the termination were

the cause of Brady's condition. In addition, Brady described sleeping difficulties, frustration and emotional upset which resulted because nobody would hear his side of the story. This evidence is sufficient to show compensable psychological harm. *Cf. Chalmers*, 762 F.2d at 761 (court found plaintiff's testimony that she suffered humiliation, embarrassment and anxiety was by itself sufficient proof of compensable psychological harm to uphold damages award).

Brady also presented evidence that he lost employment opportunities as an expert witness. Numerous professionals in the legal, academic, and medical field testified that Brady's reputation was tarnished and his usefulness as an expert witness diminished due to his discharge. Two witnesses who had used Brady as an expert witness in the past—a former U.S. Attorney in Washington and the Solicitor General in Idaho—gave testimony that indicated they and the two government offices with which they were associated at the time Brady was discharged would be unlikely to use Brady again.

Gebbie contends that the damages award was not supported by the evidence because only one of her published statements regarding Brady was "arguably inaccurate" and the harm Brady suffered was due to adverse publicity from other sources;[15] Brady's psychiatric problems started before

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[15] As discussed *supra*, Brady disputed all of the charges contained in his letter of termination and many statements in the press releases. There was sufficient evidence from which a jury could infer some or all of the statements were false. Moreover, the jury was instructed that

> [t]he publication of any stigmatizing matter which was not the result of defendant's conduct is not to be attributed to her
>
> In this regard evidence showing third parties published stigmatizing information cannot form the basis of liability against [Gebbie]. . . .

It is thus unlikely that the jury based its award on one "inaccurate" remark, or that it considered statements made by third parties in assessing the damages.

she made any statements; there was no nexus between her one "inaccurate" statement and Brady's psychiatric problems; and there was no showing of lost business opportunities or basis for lost future income. As discussed previously, there was evidence presented at trial to refute all of these contentions. Gebbie's argument thus boils down to a contention that the jury made an error when it weighed the evidence. "[W]e do not account for witness credibility, weigh evidence, or reach a different result simply because we feel it is more reasonable." *Locricchio*, 833 F.2d at 1356. The jury award in Brady's case was not clearly unsupported by the evidence or "shocking to the conscience." The district court was correct in denying Gebbie's motion for JNOV or remittitur.

VIII.

We therefore affirm the decision of the district court on all of the issues.

APPENDIX B

OREGON STATE HEALTH DIVISION

KRISTINE GEBBIE
Administrator

NEWS RELEASE

October 3, 1985
Contact: Art Keil, Exec. Asst.
229-5806

FOR IMMEDIATE RELEASE
BRADY'S TERMINATION IS FINAL

Trust and confidence have been violated by Dr. William Brady through his systematic 16-year diversion of public funds. The integrity and ethics of a position of public trust are the central standard of Oregon's system of government. Dr. Brady knowingly violated public trust and confidence and this cannot be outweighed by his technical skills.

"Trust and confidence in Oregon State Government cannot be restored if Dr. Brady continues to work," said Kristine Gebbie, Administrator of the Health Division. "I have terminated his employment effective 9:00 a.m., October 3rd."

"He presented no compelling evidence for me to retain him," Gebbie said.

The Attorney General conducted a comprehensive three month investigation of allegations against Dr. Brady and his conduct in the State Medical Examiner's office. The findings of this investigation revealed four major areas of violations that have led to his termination:

1) Dr. Brady established a private autopsy business that he conducted from the State's Medical Examiner's office. He performed, and instructed his staff to perform, autopsies as

well as process the necessary clerical work during the normal work hours they were employed by the State of Oregon. Payments from this business went into Dr. Brady's personal and private bank accounts. This money was not used for any office functions or supplies.

2) Dr. Brady performed private autopsies for federal agencies which were billed to the federal government. These autopsies should have been done in the normal process of state business and at state expense. Monies from these autopsies went into Dr. Brady's private bank accounts.

3) Dr. Brady diverted over $16,000 of monies paid to the State of Oregon and placed these funds in a private bank account from which he authorized expenditures for such things as lunches, staff parties, coffee and other items not authorized by state government regulations.

4) Dr. Brady used state contracted laboratory services for his private autopsy business and charged the State of Oregon for these services.

Dr. Larry Lewman was also given an opportunity to review the facts relating to his proposed termination. After discussing the issues Wednesday, Ms. Gebbie decided to retain Dr. Lewman in his position with the Health Division, but reduce his salary to the second step of his salary range. The Division will, of course, seek restitution of funds rightfully belonging to the State.

Dr. Lewman performed private autopsies for personal gain, but did so without questioning the apparent standards of practice set by his supervisor. He was not involved in the so-called "slush fund" issue.

Dr. Lewman will continue to provide forensic pathology services and technical assistance to the statewide Medical Exam-

iner Program. "The Division will continue to deliver a high level of medical examiner service to Oregonians," Gebbie said.

"State employees, particularly those in highly paid or visible positions, assume an extra burden of ethical behavior for managing the public's programs and money. State government cannot tolerate a dual system that excuses unethical behavior because of an individual's high position in government. State officials must exhibit a higher standard of integrity," said Gebbie. "I personally do not want to see state government's integrity violated in any way." Gebbie added.

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1299

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

KRISTINE M. GEBBIE, ASSISTANT DIRECTOR, HUMAN RESOURCES, ADMINISTRATOR, HEALTH DIVISION OF THE STATE OF OREGON,
PETITIONER,

v.

WILLIAM J. BRADY, M.D., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Counsel for Respondent

31 pp

QUESTIONS PRESENTED

Respondent does not accept the issues framed by petitioner. The issues are more accurately framed as follows:

1. Should this Court grant certiorari to review a case involving a denial of liberty in the course of terminating at-will employment where a jury given proper instructions, to which no exception was taken, found the government falsely charged the employee with dishonesty, immorality, and lack of integrity which foreclosed significant job opportunities, the court of appeals, after careful review, found the evidence sufficient for the jury to find as they did, and applied well established legal principles to those facts to affirm the jury's verdict?
2. Should this Court grant certiorari to review a jury verdict that the process offered failed to meet minimum standards of due process where the evidence showed,
   (a) the decision-maker was biased,
   (b) she announced her decision before hearing or considering any response of the employee by saying, "I don't know what in heaven's name you could tell me, Bill, that would make me change my mind,"
   (c) her assistant told Brady's lawyer that the meeting following the discharge was a mere courtesy and not a hearing, so that the State was simply going through the motions and not conducting a meaningful hearing,
   (d) she refused a reasonable continuance and re-

Questions Presented -- Continued

fused to grant a hearing solely because Brady was an at-will employee,

and the court of appeals, after careful review, found the evidence supported the jury's findings and affirmed the verdict by applying well-established law to those facts?

3. Should this Court grant certiorari to determine if Gebbie is entitled to qualified immunity based upon her claim that she could not be sure how much process was sufficient, where the jury found she failed to grant even the constitutional minimum of a meaningful hearing at a meaningful time, and the court of appeals affirmed that finding after careful review of the evidence and application of well established legal principles?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Response to Petition for Writ of Certiorari 1

Opinion Below 2

Juristiction 2

Constitutional Provision Involved 2

Statement of the Case 2

Factual Summary 2

The Writ should not be Granted and the Petition should be Dismissed 6

A. Introduction and Summary of Argument 6

B. Falsely accusing a government employee of dishonesty and theft in the course of terminating his at-will employment entitles the employee to a name-clearing hearing that comports with due process 7

C. The evidence supports the jury's finding, affirmed by the court of appeals, that the process offered Brady to enable him to clear his name did not pass constitutional muster 19

D. The facts found by the jury rebut Gebbie's claim of qualified immunity 21

Conclusion 23

TABLE OF AUTHORITIES

Cases Cited **Page**

Anderson v. Creighton, 483 U.S.—, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 23

Baden v. Koch, 799 F.2d 825 (2nd Cir. 1986) 13, 21

Barr v. Matteo, 360 U.S. 564 (1959) 18

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 10-12, 15

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) ..... passim

Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988) .. passim

Cafeteria Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) 10

Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) 11-12

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 18

McGhee v. Draper, 639 F.2d 639, 642-43 (10th Cir. 1981) 6

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 21-22

Matthews v. Harney County, Or., School Dist. No. 4, 819 F.3d 889 (9th Cir. 1987) 20

Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) 14-15

Nathanson v. United States, 630 F.2d 1260 (8th Cir. 1980) 14

Cases Cited — Continued **Page**

New York Times v. Sullivan, 376 U.S. 254 (1964) 18

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) 12-13

Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded*, 438 U.S. 902 (1980) 14

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 9-12

Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) 6, 8

Stretten v. Wadsworth, 537 F.2d 361 (9th Cir. 1976) .14

Velger v. Cawley, 525 F.2d 334 (2nd Cir. 1975), *rev'd on other grounds sub nom, Codd v. Velger*, 429 U.S. 624 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) 13

Ventetuolo v. Burke, 596 F.2d 476 (1st Cir. 1979).....15

Other Authorities

Bartlett, *Familiar Quotations*, 14th Ed., p. 386 (1968).. 13

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

KRISTINE M. GEBBIE, ASSISTANT DIRECTOR, HUMAN RESOURCES, ADMINISTRATOR, HEALTH DIVISION OF THE STATE OF OREGON,
PETITIONER,

v.

WILLIAM J. BRADY, M.D., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, William J. Brady, M.D., respectfully prays that the petition for certiorari to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Ninth Circuit in *Brady v. Gebbie*, Nos. 87-3839 and 87-3877, filed October 31, 1988, be denied.

OPINION BELOW

The court of appeals opinion is reported as *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988), is attached as Appendix A to the Petition for Certiorari. The district court did not issue an opinion.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

CONSTITUTIONAL PROVISION INVOLVED

Respondent accepts Petitioner's statement of the constitutional provision involved.

STATEMENT OF THE CASE

Factual Summary.

Petitioner (hereafter "Gebbie"), has set forth a factual summary which ignores the fact that this case was tried before a jury. For example, one of the hotly-contested issues before the jury was the nature of the office account. Gebbie contended it was a "private" account, used for Brady's private purposes. Brady contended otherwise. He claimed it was used only for legitimate public purposes, and that he received no personal benefit therefrom. The jury agreed with him. Nevertheless, petitioner, at the outset of her factual summary, airily asserts that on June 2, 1986, Brady told Gebbie he had kept a "private office account."

The facts are far more accurately set forth in the opinion of the court of appeals. *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988). *See* Petition for Cert. App-A. As found by that court, there was evidence in the record from which the jury could and did find that Gebbie falsely accused Brady of keeping a "slush fund," systematically misusing public funds over a 16-year period, diverting or funneling public funds into a personal account, violating conflict of interest rules by conducting private autopsies for personal gain while using state facilities, and causing the state to be billed for toxicology charges on his private autopsies.

The jury found all of these allegations false and rightly so. There was no "slush fund." The unsolicited monies received for pituitary gland contributions were used strictly for legitimate office purposes. The account was openly kept and everyone in the medical examiner's office was aware of it. It was "off budget," but there was uncontradicted evidence of similar accounts kept by other state officials for which no disciplinary action, let alone discharge, was ever administered. With respect to the performance of private autopsies for which he was paid by private parties, that practice was specifically authorized and encouraged by the state. All pathologists in the medical examiner's office performed private autopsies for pay. In fact, the testimony was that part of the inducement for physicians to accept employment in the medical examiner's office was that they would be permitted to perform private autopsies to supplement their state salary which was far below what a physician could ordinarily earn in private practice. Though Gebbie denied she was aware of this practice, there was evidence from which the jury could have found otherwise. There was also evidence from which the jury could have found she knew about the office account and did nothing about

it until it became a hot media issue. The jury could have legitimately inferred that she used Brady as a scapegoat to divert attention from her own shortcomings.

With respect to the alleged process offered by Gebbie, the court of appeals correctly found:

> Brady testified that on September 21, 1985 — prior to the time Gebbie handed him the letter of "proposed" discharge — Gebbie told him "I don't know what in heaven's name you can tell me, Bill, that would make me change my mind." Dr. Harris, who was present at that meeting, also testified that Gebbie told him "I can't conceive of what the reasons will be" in reference to Brady's possible response to the charges. Hoevet testified that he saw Gebbie on a television news program prior to the October 2, 1985 meeting, at which time Gebbie said she couldn't think of what would make her change her mind about terminating Brady. He also testified that prior to the October 2, 1985 meeting, Gebbie wrote a letter to another doctor in which she stated that she had fired Brady. A jury could reasonably infer from this evidence that Gebbie had made up her mind about Brady before the meeting and would have disregarded any evidence which Brady presented in mitigation or rebuttal.
>
> Moreover, there was sufficient evidence presented from which a jury could reasonably infer that Gebbie did not allow Brady sufficient time to prepare for the meeting, and thus did not give him a "meaningful" opportunity to respond to the charges. Several witnesses testified regarding Gebbie's repeated refusal of requests for a

> continuance of the October 2, 1985 meeting. Hoevet testified that prior to the meeting he had asked Hirst for a continuance, and that the request was refused on September 30, 1985 by one of Gebbie's aides. Dr. Harris testified that he and a group of pathologists had tried to get both a hearing for Brady and a delay of the meeting. Snyder testified that on the day of the meeting she also requested a delay. In addition, both Harris and Snyder gave testimony that Gebbie had asked specific questions at the October 2, 1985 meeting as to whether Brady had used particular pieces of equipment for private autopsies, and that she had refused Brady's request for a continuance to have time to check his records. A jury could infer from this that the "hearing" was a mere formality and that Gebbie did not give Brady a "meaningful opportunity" to clear his name or be heard. *See Matthews*, 819 F.2d at 893-94 ("[d]ue process of law [is not present] where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard")(quoting *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). (Petition for Cert. App-22-23)

Furthermore, it is important to note that Gebbie denied Brady a hearing not because he was not entitled to a liberty interest, but solely because he was an at-will employee. Gebbie did not even address the liberty interest issue in refusing to grant Brady due process. Her lawyer testified she advised Gebbie not to grant Brady a hearing solely because he was in executive service and, therefore, an at-will employee.

Moreover, when Gebbie issued her letter of suspen-

sion and proposed termination, together with the attendant press releases, she gave credence and legitimacy to the swirl of wildly false charges being leveled against Brady in the media. *See McGhee v. Draper*, 639 F.2d 639, 642-43 (10th Cir. 1981).

THE WRIT SHOULD NOT BE GRANTED AND THE PETITION SHOULD BE DISMISSED

A. Introduction and Summary of Argument.

This case turns upon its facts. The court of appeals simply applied well-settled law to the facts found by the jury. Gebbie claims the court of appeals committed three errors. In two of them, that the court of appeals (1) adopted a "*per se*" rule for determining whether a liberty interest is implicated, and (2) held the issue of what process is due is always for the jury, the court simply did not make any such rulings. The third claimed error with respect to the existence of qualified immunity turns upon the facts found by the jury. The facts show Gebbie failed to give Brady even the minimum due process required by law. As the court of appeals stated, there was no need to reach the question of whether more than the minimum was due, even though there was evidence to support that proposition. 859 F.2d, at 1555, n. 11. In addition, all three contentions involve the resolution of disputed questions of fact. Both the jury and the court of appeals found the facts in Brady's favor. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Rule 17.1 sets forth the kinds of reasons which the Court considers in granting a writ of certiorari. Only sections (a) and (c) are even arguably involved in this

case. Those sections provide:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter...
>
> * * *
>
> (c) When a...federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

In order to bring herself within these principles, Gebbie asserts the court of appeals made three legal holdings, each of which is allegedly an "unwarranted extension" of constitutional principles. Because of these alleged rulings, she claims life has been made more difficult for public officials who wish to terminate their at-will subordinates and explain the reasons for their decision. Nowhere in her brief does Gebbie mention there are two certain ways to avoid liability — either tell the truth about what the employee has done or grant him a reasonable opportunity to clear his name.

In any event, the alleged "unwarranted extensions" of constitutional principles are a figment of Gebbie's imagination in an attempt to get this Court to review a decision of the court of appeals which is simply an application of existing law to the specific facts of the case.

B. Falsely accusing a government employee of dishonesty and theft in the course of terminating his at-will employment entitles the employee to a name-clearing hearing that comports with due process.

Gebbie's discussion of whether Brady had a liberty interest entitled to due process protection is either disingenuous or reflects a fundamental misunderstanding of the nature of the protection afforded by the 14th amendment.

1. There is no conflict in the cases decided by this Court, among the circuits, within the Ninth Circuit, or between the Ninth Circuit decision in this case and any decision of this Court or any other court.

Gebbie first contends there is conflict among the previous decisions of this Court, or that this Court has never previously held that the discharge of an at-will employee, plus stigmatizing, defamatory statements, entitles the employee to a name-clearing hearing if he contests the charges. This contention simply ignores this Court's cases.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), plaintiff had a one-year contract at Wisconsin State University. He had no tenure and no property right in public employment. He was not rehired and no reason was given. In answering Roth's liberty interest claim, the Court said:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (Citing cases.) In such a case, due process

> would accord an opportunity to refute the charge before University officials...(408 U.S., at 573)

Gebbie quibbles with this clear language, claiming the Court in "the next breath," indicated more than reputational injury is required (Petition for Cert. 15). Gebbie simply misreads the case. After holding that nonrenewal plus defamation which charges dishonesty or immorality implicated a liberty interest, the Court mentioned another situation in which due process required a hearing.

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, *again*, would be a different case... (408 U.S., at 573-74; emphasis added)

Roth is, thus, a clear holding recognizing that defamation which charges dishonesty or immorality, together with termination or failing to rehire an at-will employee, is sufficient to implicate a liberty interest. A stigma which forecloses employment opportunities, without necessarily impugning morality or honesty, also suffices.

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), held defamation without more does not implicate a liberty interest. Under those circumstances, a state court action for defamation suffices to protect the citizen's interest. However, defamation plus discharge from employment does implicate a liberty interest. *Paul* is, thus, totally consistent with *Roth*. The Court in *Paul* reaffirmed *Roth*, but distinguished it because *Paul* claimed defamation only. 424 U.S., at 709-10.

Next, Gebbie attempts to manufacture a conflict between *Paul* and *Roth*, on the one hand, and *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), on the other. In *McElroy*, the government revoked the security clearance of a short-order cook which had the effect of depriving her of employment at one government facility. This Court pointed out there was no evidence of stigma.

> There is nothing to indicate that this determination would in any way impair Rachel Browner's employment opportunities anywhere else. As pointed out by Judge Prettyman, speaking for the Court of Appeals, "*Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing.* 'Security requirements' at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty." 284 F.2d, at 183. For all that appears, the Security Officer and the Superintendent may have simply thought that Rachel Brawner was garrulous, or careless with her identification badge. (367 U.S., at 898-99; emphasis added)

All three cases are remarkably consistent. All apply the rule that reputational damage which impugns honesty or morality, together with loss of at-will employment, is sufficient to implicate a liberty interest. In *Roth and McElroy*, there was no reputational damage so the liberty interest claim was denied. In *Paul*, there was no loss of government employment, so the liberty interest claim was denied. There is no conflict among these cases whatsoever.

But this is not all. There are other cases. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976),

held that an at-will police officer who was terminated was not deprived of liberty because the charges were not publicly disclosed. His interest in his, "good name, reputation, honor or integrity" (426 U.S., at 348), was therefore not impaired. If it were, his liberty interest would have been implicated. Again, the Court clearly recognized and applied the rule that termination of an at-will employee, plus publicly-disclosed defamatory statements impugning honesty or morality, is sufficient to implicate a liberty interest.

Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), is also consistent. There, a police officer was terminated and a report of an alleged suicide attempt was circulated. Gebbie claims the Court never reached the issue of whether or not defamation impugning honesty or morality, together with termination of at-will employment, is sufficient to implicate a liberty interest (Petition for Cert. 14). Again, Gebbie has misread the case. The issue which the Court declined to reach was not whether stigma plus loss of at-will employment was sufficient to implicate a liberty interest. What they refused to reach was whether a report of an alleged suicide attempt imposed a stigma, and whether that stigma was serious enough to implicate a liberty interest. The Court did not reach this question because the police officer never claimed the suicide report was false. 429 U.S., at 626-627. The Court, however, recognized and reaffirmed the rule in *Roth* and *Bishop* that a hearing is required when a non-tenured employee is stigmatized or defamed in the course of terminating his employment. "Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required..." 429 U.S., at 628.

Lastly, *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), involved the discharge of an at-will police chief amid charges of dishonesty. The city claimed the trial court erred in finding a deprivation of liberty. The Court, again, affirmed the formulation in *Roth*, *Paul*, *Bishop*, and *Codd*.

> *Wisconsin v. Constantineau*, 400 US 433, 437, 27 L Ed 2d 515, 91 S Ct 507 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake, because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Board of Regents v. Roth*, 408 US 564, 573, 33 L Ed 2d 548, 92 S Ct 2701 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and association in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city — through the unanimous resolution of the City Council — released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. *Paul v. Davis*, 424 US 693, 710, 47 L Ed 2d 405, 96 S Ct 1155 (1976). Yet the city twice refused petitioner's request that he be given written speci-

> fication of the charges against him and an opportunity to clear his name. *Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.* (445 U.S., at 633-34, n. 13; emphasis added)

Even the dissenting Justices in Owen agreed that termination plus stigmatization requires a name-clearing hearing. "Due process requires a hearing on the discharge of a government employee 'if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination...' " 445 U.S., at 661.

There is simply no inconsistency in this Court's prior cases. All the cases hold a defamatory statement which impugns morality or honesty, i.e., which stigmatizes the employee in the course of terminating his at-will employment, entitles the employee to a name-clearing hearing. Gebbie's inability to discern the consistency in this Court's prior cases recalls Matthew Henry's observation, "There are none so blind as those who will not see." Bartlett, *Familiar Quotations*, 14th Ed., p. 386 (1968)

Gebbie's myopia is equally apparent in her attempt to manufacture a conflict among the Circuits. She claims *Velger v. Cawley*, 525 F.2d 334 (2nd Cir. 1975), *rev'd on other grounds sub nom, Codd v. Velger*, 429 U.S. 624 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), is inconsistent with *Baden v. Koch*, 799 F.2d 825 (2nd Cir. 1986). *Velger* did not hold the stigma must foreclose employment opportunities. The Court merely held the accusation — a suicide attempt — was serious because it, "could have the effect of...depriving him of employment..." (525 F.2d, at 336).

In *Baden*, the Court held stigma plus demotion implicated, albeit weakly, a liberty interest. Both cases relied

on the *Roth* formulation that stigma plus termination is sufficient.

Gebbie's analysis of these two cases points up her basic confusion. A defamatory comment about an employee is sufficient if it is serious enough to impose a stigma. The only significance of foreclosure of other employment is that it is one way to measure the seriousness of the defamation. Thus, any implication of dishonesty or immorality is serious enough to impose a stigma because it places honor and integrity in question. It is also serious enough to interfere with other employment. For that reason, any termination accompanied by charges of dishonesty or immorality is sufficient to implicate a liberty interest. *See Roth*, 408 U.S., at 573-74.

The Eighth Circuit cases cited by Gebbie (Petition for Cert. 16), establish the same proposition. Far from being in conflict with *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded*, 438 U.S. 902 (1980), *Nathanson v. United States*, 630 F.2d 1260 (8th Cir. 1980), cites and relies upon *Owen*. The only difference is that in *Nathanson* the alleged defamation was not sufficiently serious (inability to accept guidance, etc.). In *Owen*, the defamation was sufficient because it impugned the employee's honesty and integrity. There is no inconsistency. The same rule was applied in both cases. The facts were different, so the result was different.

Similarly, *Stretten v. Wadsworth*, 537 F.2d 361 (9th Cir. 1976), is not inconsistent with this case. *Stretten* merely held a charge of incompetency was not sufficient to impose a stigma. In *Brady*, the charges involve dishonesty and immorality. Those charges are universally held to impose a stigma and to implicate a liberty interest.

Finally, Gebbie cites *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985), for the proposition that any defamation must involve charges of immorality, dishonesty, etc., *or*

impose a stigma which forecloses employment opportunities. She claims this is inconsistent with the Ninth Circuit's decision in this case. This particular claim borders on the frivolous. The Ninth Circuit announced the rule as follows:

> "[A] liberty interest is implicated in the employment termination context if the charge impairs a reputation for honesty or morality." *Matthews v. Harney County, Or., School Dist. No. 4*, 819 F.2d 889, 891 (9th Cir. 1987). (859 F.2d, at 1552; emphasis added)

This is virtually identical to *Munson* and is consistent with every other case cited by Gebbie. Nor is *Ventetuolo v. Burke*, 596 F.2d 476 (1st Cir. 1979), any different. In fact, that case states one way to implicate a liberty interest in the course of firing an at-will employee is to make, "'any charge...that might seriously damage his standing and association in [the] community.'" (596 F.2d, at 482, *citing*, *Roth* and *Bishop*, *supra*.)

In this case, Gebbie charged Brady with using state funds for his private purposes (i.e., stealing), performing private autopsies for pay while using state facilities and equipment, in violation of conflict of interest rules, violating public trust and confidence, and billing the state for toxicology charges he should have paid himself. In addition, she charged him with knowingly violating trust and confidence, a systematic 16-year diversion of public funds to his own use, and generally failing to measure up to the integrity and ethics required of public employees. *See*, Petition for Cert. App-B.

Is there any question these charges, "seriously damaged [Brady's] standing and association in the community"? *Ventetuolo*, 596 F.2d, at 482; *Roth*, 408 U.S., at 573. The charges leveled against Brady would be sufficient to implicate a liberty interest in any Circuit in

the country. They even satisfy Gebbie's formulation of the rule. Gebbie has, therefore, constructed a straw man (that the Ninth Circuit adopted a rule that *any* defamatory remark plus termination of an at-will employee is sufficient to implicate a liberty interest), and has then proceeded to attempt to demolish that straw man by completely misreading the cases she cites. The plain fact is the Ninth Circuit adopted no such rule. The rule they did adopt is clearly set forth in the opinion (859 F.2d, at 1552; *see* p. 15 of this brief). This rule is consistent with every case decided by this Court or any of the Circuits.

2. Even if the "rule" contended for by Gebbie, were inconsistent with the rule stated by the Ninth Circuit, there is no basis for granting certiorari for two reasons:

(a) There was overwhelming evidence of both foreclosure of employment opportunities and charges impugning honesty, integrity and morality; and,

(b) The jury was instructed precisely as Gebbie contends the rule should be, and they decided the case in Brady's favor.

It is almost beyond belief that, although Gebbie claims the charges she leveled against Brady were not serious enough to implicate a liberty interest, nowhere does she cite a case that even intimates these charges are insufficient. As indicated, the charges are the most serious kind imaginable for a public employee. The jury found all of them false. Summarized, they are:

(a) Brady established a personal autopsy business conducted from the medical examiner's office using state facilities, employees, equipment and time, and lined his own pockets with the money obtained;

(b) Brady did federal government autop-

sies which the federal government paid for. This money should have gone to the state, but Brady stole it;

(c) Brady systematically stole $16,000 from money paid to the State of Oregon which he placed in a private bank account and used for office parties and lunches; and,

(d) Brady charged the state for lab services on his private autopsies which should have been paid by him. (App. B petition for certiorari)

Gebbie further embellished these charges by accusing Brady of knowingly violating public trust and confidence. She stated that trust and confidence in state government could not be restored if Brady continued to work.

Can anyone doubt these charges severely impugn Brady's character for honesty, morality or integrity? Can anyone imagine another government employer wanting to hire someone who has systematically stolen money from his last government employer and has violated every ethical principle imaginable? If these charges are not serious enough to implicate a liberty interest, it is difficult to imagine any which would be sufficient. In addition to the charges themselves, the court of appeals correctly found abundant evidence of foreclosure of employment opportunities. 859 F.2d, at 1558.

Furthermore, the trial court required the jury to find foreclosure of employment opportunities before they could return a verdict in favor of Brady. The court listed what the jury had to find.

> One, that in the course of discharging [sic] plaintiff defendant made certain charges against the plaintiff which were false; two, that defendant voluntarily published or caused to be published the charges made against plaintiff; three, *that those charges placed a stigma upon*

> *plaintiff's good name, reputation, honor or integrity; four, that the charges imposed a stigma on plaintiff that foreclosed his freedom to take advantage of other employment opportunities*; five, that plaintiff was, in fact, denied an opportunity to clear his name through notice and a hearing. (Closing Argument Tr. 73-74; emphasis added)

No exception was taken to this instruction.

This case was not submitted to the jury based upon any *"per se"* rule. The jury was clearly instructed that they had to find stigmatization which impugned Brady's honor and integrity, and foreclosed employment opportunities. There was evidence from which the jury could have found those elements. The court of appeals agreed that the evidence justified such a finding. Therefore, there is no reason to grant a writ of certiorari to decide whether there is a *"per se"* rule or not. The simple fact is this case was tried and submitted to the jury in accordance with Gebbie's theory. Not only is there no conflict with previous cases, there is no issue in this case. Under any possible formulation of the rule as to when a terminated at-will employee is entitled to a name-clearing hearing, Brady was entitled to such a hearing.

Gebbie's discussion of 1st amendment libel cases, *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and the absolute immunity case of *Barr v. Matteo*, 360 U.S. 564 (1959), completely misses the point. This is not a suit for defamation. Government officials are free to fire at-will employees without liability. They can even fire and stigmatize them without liability. However, if they fire and stigmatize them, due process requires they be given an opportunity to rebut the charges in a name-clearing hearing. It is the failure to grant a meaningful name-clearing hear-

ing that is the touchstone of liability in this case.

C. The evidence supports the jury's finding, affirmed by the court of appeals, that the process offered Brady to enable him to clear his name did not pass constitutional muster.

Gebbie's argument on the process offered Brady is curious. She claims the Ninth Circuit erred in holding the process due is always a question of fact for the jury. The court made no such holding. Gebbie has been unable to point to any language in the court's opinion which suggests the process due is always a jury question. As a matter of fact, all the court of appeals held was that the process offered–a meeting before a biased decision-maker who was simply going through the motions–could be found by the jury to be less than constitutionally required. The court of appeals did not hold the process, such as it was, insufficient as a matter of law. It only held that the jury could find it was insufficient on the facts of the case. This is a far cry from saying that the adequacy of the process offered is a jury question in every case.

The facts show Gebbie was biased, Brady was not given sufficient time to prepare for the hearing, a continuance was unfairly refused, the hearing was a mere formality, and Brady was denied an opportunity to check his records in order to respond to specific questions. These facts do not constitute a meaningful opportunity to be heard.

Moreover, the trial court instructed the jury as follows:

> Due process requires a fair hearing. The minimum, there must be an opportunity to be heard at a meaningful time and in a meaningful

> manner. There is no rigid requirements as to the type of hearing a person is entitled.
>
> The nature of the hearing which must be provided depends upon the circumstances of the particular case. The factors to be considered include the private interest that will be affected — that will be the interest of the plaintiff Brady, the risk of erroneous deprivation of that interest through the procedures used and the physical and administrative burdens that any additional procedure requirements would entail. (Closing Argument Tr. 74)

No exception was taken to this instruction, nor did Gebbie urge any error in that instruction on appeal. The only remaining question is whether there was evidence from which the jury could find the process inadequate or not meaningful in time or manner. Again, since there was evidence Gebbie had already made up her mind and would not be swayed by any evidence, the jury could conclude she was biased. Since there was evidence from Gebbie's own assistant that the meeting was not a real hearing, but the state was simply going through the motions as a courtesy, the jury could have concluded this was not a meaningful opportunity to clear his name. This is all the court of appeals held. 859 F.2d, at 1554-55. It did not hold that in every case "meaningfulness" is a jury question. It only held that in this case it was a jury question because of the evidence. See *Matthews v. Harney County, Or., School Dist. No. 4*, 819 F.3d 889 (9th Cir. 1987). Gebbie has not pointed to any reason why this evidence should be ignored. The court's approach, therefore, is not, "sharply inconsistent with that of several other circuits," nor is it, "flatly wrong." (Petition for Cert. 25.)[1]

D. The facts found by the jury rebut Gebbie's claim of qualified immunity.

Here again, Gebbie misreads the court's opinion. According to her:

> Under the Ninth Circuit's approach, there are no constitutional minimums for a name-clearing hearing. Thus, no administrator can know in advance, nor can any government attorney advise, that a particular form or timing of pre-hearing notice will suffice; a jury may think that ten days' notice, rather than seven, would have been more "meaningful." (Petition for Cert. 29)

This is arrant nonsense. The constitutional minimums are those that grant the employee a meaningful opportunity to clear his or her name. It is impossible to lay out in cookbook fashion the precise recipe to avoid liability in every case. Each case must be decided on its own facts. The court of appeals stated:

> To determine what process is due in an individual case — and if it is due before or after the deprivation of a constitutionally protected interest — a court must apply the three-part test set out in *Mathews v. Eldridge*, 424 U.S. at 334-35, 96 S.Ct. at 902. That test balances 1) the

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[1] *Baden v. Koch* (799 F.2d 825 (2nd Cir. 1986), is not inconsistent. There, Baden contended he was entitled to more process than he received. Since the process offered met constitutional minimums (i.e., it was fair), and Baden had only a weak liberty interest, the minimum was sufficient. In Brady, the jury found the process offered did not even meet the minimum standard of a meaningful opportunity to be heard. Therefore, the court of appeals held there was no need to consider if Brady was entitled to more than the minimum, even though the evidence justified such a finding. 859 F.2d, at 1555, n. 11.

> private interest that will be affected, 2) the risk of an erroneous deprivation of that interest through the procedures used, and 3) the additional cost and administrative burdens that additional procedures would entail. *Id.* Thus, although a hearing where the individual has an opportunity to rebut the charges against him is always required in due process cases, when the hearing must be held and what procedural protections must be granted at the hearing are determined on a case-by-case basis. (859 F.2d, at 1554)

The court of appeals held the law was clearly established in 1985 that publicly-disclosed charges of immorality or dishonesty implicated a liberty interest, requiring a due process hearing if the accuracy of the charge was disputed. The law also clearly required that the hearing be meaningful in time and manner to give employee a reasonable opportunity to clear his name. The court then examined the process provided in the light of *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and found that the unlawfulness of Gebbie's actions would have been apparent. This is obvious in the light of the facts found by the jury. Clearly, Gebbie had to know the law established, at a minimum, that the hearing must be fairly conducted by a reasonably fair decision-maker. In this case, the jury found neither existed. How could anyone reasonably believe they could grant a sham hearing before a biased adjudicator and still comply with due process? The court of appeals was clearly correct that there was sufficient evidence from which the jury could infer that a reasonable official would have known Gebbie's conduct was violating Brady's constitutional right to minimum process. (859 F.2d, at 1557.) This is certainly a far cry from

holding that a jury can second-guess any process offered by a state official.

In deciding immunity, this Court has previously held the inquiry must be fact specific. *Anderson v. Creighton*, 483 U.S.—, 107 S.Ct. 3034, 97 L.Ed.2d 523, 532 (1987). The "fact specific" inquiry, for purposes of qualified immunity in this case, is:

> In 1985, could the defendant, as a matter of law, reasonably believe that an at-will state employee who was publicly and falsely accused of dishonesty, immorality and a breach of public trust, in the course of terminating his employment, would not be entitled to a hearing to clear his name before an unbiased decision-maker who was not conducting a sham inquiry?

The question answers itself. The jury found all the relevant facts against Gebbie, despite her contentions to the contrary. It is far too late to contest those facts in this Court. Gebbie was not entitled to immunity as a matter of law.

CONCLUSION

1. Gebbie's claim that this Court should grant certiorari because the court of appeals held any defamation is sufficient to implicate a liberty interest is without merit for two reasons: First, the court of appeals adopted no such rule. 859 F.2d, at 1552. Second, Gebbie's claim that more than "any defamatory statement" is necessary is obviated because the trial court instructed the jury they had to find the charges impugned Brady's honesty and integrity, *and* that he lost employment opportunities.

2. Gebbie's claim that the court of appeals adopted a rule that the question of whether the process offered is meaningful is always for the jury is also without merit. No such rule was adopted. All the court of appeals held was that, in this case, the evidence was sufficient to submit the issue to the jury. Gebbie has not even attempted to show the evidence was not sufficient.

3. Gebbie's claim of qualified immunity, likewise, does not justify granting certiorari in this case. Gebbie did not act in "unquestioned good faith," and the law requiring a hearing to enable an employee to clear his name after being terminated and stigmatized was well settled. The evidence showed a reasonable official would have known Gebbie's conduct violated Brady's constitutional rights.

In short, every claim of Gebbie involves a determination of the facts surrounding Brady's discharge. The jury found the facts in Brady's favor. The court of appeals affirmed by applying well established law to those facts. Certiorari is not a device for reexamining facts, nor for determining the sufficiency of the evidence. The petition for a writ of certiorari should be denied, and the court of appeals affirmed.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 88-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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Petitioner,

v.

WILLIAM J. BRADY, M.D.,

Respondent.

On Petition for a writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In his brief in opposition, Brady raises primarily two arguments. First, he claims that the court of appeals stated the correct legal test for determining when a liberty interest is implicated and what procedures are required in a liberty interest hearing. The state has explained in its petition for certiorari that the court of appeals' legal standard improperly would recognize a liberty interest even when an employee is not foreclosed from pursuing his chosen career or has not incurred similar substantial disability beyond that inherent in a discharge from visible public office. The state also argued that the lower court's test improperly would permit a jury to decide that any procedural deficiency, no matter how minor, equals a due process deprivation. Brady's

arguments on these points do not raise any new matter and, in accordance with Rule 22.5, the state does not offer any argument in reply.

Brady argues secondly, however, that even if the Ninth Circuit announced the wrong test, this Court should deny certiorari because the result in this case would not change under the test the state advocates. Brady asserts that the jury was instructed in accordance with the state's theories, including the contention that the jury had to find that Gebbie's charges foreclosed Brady's freedom to take advantage of future employment opportunities; he also claims that the Ninth Circuit expressly and properly concluded that there was "abundant evidence" to support the jury's verdict. Brief in Opp. at 16-19.

Assuming, arguendo, that Brady were correct in his "no harm, no foul" argument, Brady's argument is not a reason for denying certiorari. This Court does not grant certiorari to correct erroneous results, nor should it decline to hear important legal questions even if this Court's review may lead to affirmance of the judgment below. This case illustrates the wisdom of the Court's approach to granting certiorari. The Ninth Circuit's opinion has far-reaching ramifications beyond the mere outcome of this case. If the Ninth Circuit has announced an incorrect standard for determining when a party has proven the deprivation of a liberty interest, or if it has announced a standard that converts every claimed procedural deficiency, no matter how minor, into a jury question, then the error will repeat itself. State governments will be exposed to potentially unlimited damages in cases that should never have been submitted to juries in the first place. As significant, the Ninth Circuit's erroneous legal rules will fuel improper jury instructions in future cases. Apart from who wins or loses this case, the legal questions presented are important and merit this Court's certiorari review.

Brady, moreover, is wrong when he asserts that the Ninth Circuit both expressly and properly concluded that the evidence supported the jury's findings on all elements on which it had been instructed. As the Ninth Circuit viewed the essential elements of a liberty interest claim, an at-will public official need not demonstrate foreclosure from future employment opportunities, or any other similar disability. Instead, the court of appeals held discharge and damage to reputation were enough. *Brady v. Gebbie*, 859 F.2d 1543, 1552-54 (9th Cir., 1988). *See also*, Brief in Opp. at 15. Thus, having decided that a disability like foreclosure from future employment is not an element of a liberty interest deprivation, the court did not inquire, let alone decide, whether the evidence was adequate to submit to the jury on that issue.

Brady's assertion that the court found "abundant evidence of foreclosure of employment opportunities" (Brief in Opp. at 17), not only is incorrect, it subtly and significantly recasts the relevant inquiry. The element on which the jury had been instructed, and which the trial court in denying the state's motion for directed verdict had to conclude the evidence supported, was whether Gebbie's "charges imposed a stigma [on Brady] that foreclosed his freedom to take advantage of other employment opportunities." *See* Brief in Opp. at 18. The court of appeals observed only that "[t]wo witnesses * * * indicated they * * * would be unlikely to use Brady again" as an expert witness. 859 F.2d at 1558.[1]

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[1] In the petition for certiorari, the state summarizes the evidence concerning the impact Gebbie's statements had on Brady's reputation and future employment. Pet. Cert. at 18-19. Brady does not take issue with the state's summary. As we note after discussing this evidence, the court of appeals considered the evidence of impact on future employment only in rejecting the state's motion for judgment notwithstanding the verdict or remittitur, not in defining the elements of a liberty interest deprivation or the adequacy of the evidence to survive a directed verdict. The court of appeals' discussion of the sufficiency of the evidence to submit the case to the jury occurs earlier at 859 F.2d 1552-1554.

This evidence simply was insufficient to find that Brady's "freedom to take advantage of other employment opportunities"—*i.e.* his freedom to pursue his profession—had been impaired in any significant way by Gebbie's public statements. Although Brady proved that he may have lost one or two commissions as an expert witness, even he did not dispute that he had managed to establish a lucrative private pathology practice. This evidence fell far short of implicating an interest of constitutional dimension, at least under a correct legal formulation of what a high ranking public official must show to establish a deprivation of liberty.

Brady's new arguments opposing certiorari thus raise illusory objections to review. Even if the jury arguably heard the case under a correct instruction on liberty interest, the fact remains that the case should never have been submitted to the jury at all. The Ninth Circuit's contrary conclusion is predicated on a liberty interest test that is extraordinary lenient and legally insufficient.

Brady ultimately does not answer the challenge posed by the Ninth Circuit's decision: how government can discharge high ranking officials and explain its actions to the public without creating opened-ended exposure. Instead, Brady's brief opposing certiorari demonstrates the danger. A clever trial lawyer can rephrase nearly any neutral public explanation of a discharge decision into stigmatizing terms (e.g. Brady's counsel recharacterizes the allegation that Brady maintained a private account to fund office amenities as an allegation that he "systematically stole" government funds, Brief in Opp. at 17). Thus, through the efforts of a skillful lawyer, innocuous facts are spun into inflammatory ones, objective assessments are characterized in emotion-laden terms, and twelve jurors are the final arbiters of what becomes a debate over the wisdom or non-wisdom of governmental judgments that a high-ranking, at-will official no longer inspires the public's trust and confidence. In the end, just

as Brady argues should be the case here, nearly every set of facts gives rise to a jury question, and nearly every jury verdict is left undisturbed on appeal. The state seeks the Court's review because this result does not reflect a correct balance of the interests the constitutional liberty clause was intended to secure, and because the consequences are forcefully at odds with the public's interests.

Respectfully submitted,

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